

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**





# TRANSCRIPT OF RECORD.

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Court of Appeals of the District of Columbia.

OCTOBER TERM, 1925

No. 4367.

No. —, SPECIAL CALENDAR

252

UNITED STATES OF AMERICA *EX REL.* CHARLES CARPY,  
W. A. T. AGARD, F. H. STEWART, *ET AL.*, APPELLANTS,

*vs.*

HUBERT WORK, SECRETARY OF THE INTERIOR.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF  
COLUMBIA.

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# Court of Appeals of the District of Columbia

OCTOBER TERM, 1925

**No. 4367.**

**No. —, SPECIAL CALENDAR.**

UNITED STATES OF AMERICA *EX REL.* CHARLES CARPY,  
W. A. T. AGARD, F. H. STEWART, AND DOTTE S. MCGIL-  
VRAY, EXECUTRIX OF THE LAST WILL AND TESTA-  
MENT OF ELDORA BROWN, DECEASED, DOING BUSI-  
NESS UNDER THE FIRM NAME AND STYLE OF TEDOC  
COMPANY, APPELLANTS,

*vs.*

HUBERT WORK, SECRETARY OF THE INTERIOR,  
APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF  
COLUMBIA.

## INDEX.

|                            | Original | Print |
|----------------------------|----------|-------|
| Caption .....              | <i>a</i> | 1     |
| Petition for mandamus..... | 1        | 2     |
| Exhibit A.....             | 22       | 13    |
| B .....                    | 24       | 15    |
| C .....                    | 25       | 15    |
| D .....                    | 29       | 18    |
| E .....                    | 37       | 23    |
| F .....                    | 39       | 24    |
| G .....                    | 41       | 25    |
| H .....                    | 43       | 27    |
| I .....                    | 44       | 27    |



|                                                                | Original | Print |
|----------------------------------------------------------------|----------|-------|
| Exhibit J .....                                                | 46       | 28    |
| K .....                                                        | 47       | 29    |
| L .....                                                        | 51       | 31    |
| M .....                                                        | 54       | 33    |
| N .....                                                        | 57       | 35    |
| O .....                                                        | 61       | 37    |
| P .....                                                        | 65       | 39    |
| Q .....                                                        | 67       | 40    |
| R .....                                                        | 72       | 43    |
| S .....                                                        | 74       | 44    |
| T .....                                                        | 98       | 59    |
| U .....                                                        | 99       | 59    |
| V .....                                                        | 109      | 67    |
| W .....                                                        | 114      | 70    |
| X .....                                                        | 115      | 71    |
| Y .....                                                        | 117      | 72    |
| Z .....                                                        | 118      | 73    |
| Z A.....                                                       | 121      | 74    |
| AA .....                                                       | 123      | 75    |
| BB .....                                                       | 125      | 76    |
| CC .....                                                       | 127      | 77    |
| DD .....                                                       | 129      | 79    |
| EE .....                                                       | 132      | 80    |
| FF .....                                                       | 134      | 81    |
| GG .....                                                       | 136      | 82    |
| Rule to show cause.....                                        | 137      | 83    |
| Respondent's answer.....                                       | 137      | 83    |
| Relator's answer to respondent's return.....                   | 139      | 84    |
| Demurrer to relator's replication.....                         | 143      | 87    |
| Memorandum of court.....                                       | 144      | 87    |
| Order sustaining demurrer.....                                 | 145      | 87    |
| Order for appearance.....                                      | 145      | 88    |
| Order sustaining demurrer; judgment; appeal noted by relator.  | 146      | 88    |
| Memorandum: \$50 deposited in lieu of undertaking on appeal... | 146      | 89    |
| Assignment of errors.....                                      | 147      | 89    |
| Designation of record.....                                     | 147      | 89    |
| Clerk's certificate.....                                       | 149      | 90    |

# Court of Appeals of the District of Columbia.

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No. 4367.

UNITED STATES OF AMERICA ex Rel. CHARLES CARPY et al.,  
Appellants,

vs.

HUBERT WORK, Secretary of the Interior.

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*a* Supreme Court of the District of Columbia.

At Law.

No. 69893.

UNITED STATES OF AMERICA ex Rel. CHARLES CARPY; W. A. T.  
Agard, F. H. Stewart, and Dotte S. McGilvray, Executrix of the  
Last Will and Testament of Eldora Brown, Deceased, Doing Busi-  
ness under the Firm Name and Style of Tedoc Company, Relator,

vs.

HUBERT WORK, Secretary of the Interior, Respondent.

UNITED STATES OF AMERICA,  
*District of Columbia, ss:*

Be it remembered that in the Supreme Court of the District of  
Columbia, at the City of Washington, in said District, at the times  
hereinafter mentioned, the following papers were filed and proceed-  
ings had, in the above-entitled cause, to wit:



1 Supreme Court of the District of Columbia

At Law.

No. 69893.

UNITED STATES OF AMERICA ex Rel. CHARLES CARPY, W. A. T. Agard, F. H. Stewart, and Dotte S. McGilvray, Executrix of the Last Will and Testament of Eldora Brown, Deceased, Doing Business under the Firm Name and Style of Tedoc Company, Relator,

vs.

HUBERT WORK, Secretary of the Interior, Respondent.

*Petition for Mandamus.*

Filed Feb. 19, 1925.

The petition of the United States on the relation of the Tedoc Company respectfully represents:

I. That relator, Tedoc Company, is a voluntary association of citizens of the State of California, organized on or about April 23, 1917, for the purpose of engaging in the business of mining, and producing chrome in said state and having its principal office and place of business at San Francisco, in said state. That the members of said Association are Charles Carpy, W. A. T. Agard, F. H. Stewart and Eldora Brown. That said Eldora Brown died in the city and county of San Francisco, state of California, on June 25, 1924, that thereafter, upon proceedings duly had and taken, the Superior Court of the state of California, in and for the city and county of San Francisco, by its decree duly given, made and entered, appointed Dotte S. McGilvray, executriv of the last will and testament  
2 of said Eldora Brown, deceased, and issued letters testamentary to her and she is now the duly appointed, qualified and acting executrix of the last will and testament of said Eldora Brown, deceased.

That this petition is brought for a writ of mandamus against the respondent, Hubert Work, a citizen of the state of Colorado, now residing in the District of Columbia.

II. That the said Hubert Work, respondent, was and now is Secretary of the Interior of the United States, and as such charged with the administration of the laws of the United States relative to war minerals relief claims, and especially Section 5 of the Act of March 2, 1919, (40 Stat., 1272) as amended by the Act of November 23, 1921 (42 Stat., 322) and is sued in his official capacity as Secretary of the Interior as aforesaid.

III. That the said respondent, as Secretary of the Interior, is, under Section 5 of the Act of March 2, 1919 and said Act of November 23, 1921, copies of which are attached hereto, made a part hereof and marked Exhibits A and B:

"\* \* \* authorized to adjust, liquidate, and pay such net losses as have been suffered by any personal firm, or corporation, by reason of producing or preparing to produce, either managnese, chrome, pyrites, or tungsten in compliance with the request or demand of the Department of the Interior, the War Industries Board, the War Trade Board, the Shipping Board, or the Emergency Fleet Corporation, to supply the urgent needs of the nation in the prosecution of the war \* \* \*."

"That all claimants who, in response to any personal, written, or published request, demand, solicitation or appeal \* \* \* in good faith expended money in producing or preparing to produce any of the ores or minerals named \* \* \*, shall be reimbursed such net losses as they may have incurred and are in justice and equity entitled to from the appropriation in said Act. \* \* \*"

3 IV. That the Secretary of the Interior, acting under the provisions of the said Section 5 of the Act of November 2, 1919, organized the War Minerals Relief Commission in the Department of the Interior for the consideration of claims arising under said Act and promulgated certain regulations covering the filing and adjudication of such claims; and relator, pursuant to said Act, and the said regulations, on or before June 2, 1919, filed in the office of the Secretary of the Interior, Washington, D. C., its itemized claim, duly verified, for net losses suffered by reason of producing or preparing to produce chrome in compliance with the request of the Department of the Interior to supply the urgent needs of the  
4 Nation in the prosecution of the war.

Relator's claim was numbered by the said Secretary of the Interior as Claim No. 680 and aggregated the sum of \$37,326.03.

V. Relator's said claim was considered by said War Minerals Relief Commission and on May 14, 1920, said Commission made its recommendation in writing to the Secretary that no award be made to relator. Said recommendation was based on a conclusion reached by said Commission that relator's losses were suffered because of a contract for the sale of chrome entered into May 10, 1917, and not because of a compliance with said request or demand of the Department of the Interior. A copy of said recommendation is attached hereto, made a part hereof and marked Exhibit C.

That thereafter relator petitioned for a rehearing and same was granted. That on July 6, 1920, relator presented and filed with said Secretary, the affidavits of W. A. T. Agard, Chas. Carpy and Eldora Brown. Thereafter said affidavits were considered by said Commission and on August 19, 1920, said Commission made its decision in writing, adhering to its former conclusion, which affidavits and decision are attached hereto, made a part hereof and marked respectively Exhibits D, E, F and G.

VI. Thereafter and pursuant to the said regulations, relator perfected an appeal from said recommendation to the Secretary of the Interior, and thereafter and on October 26, 1920, said Secretary made his decision denying any award to relator. That a copy of said decision is attached hereto, made a part hereof and marked Exhibit H.



VII. That on November 9, 1920, relator duly petitioned said Secretary for a rehearing and on November 19, 1920, said Secretary denied same. That copies of said petition and said decision  
5 are attached hereto, made a part hereof and marked respectively Exhibits I and J.

VIII. That thereafter relator duly petitioned said secretary for a rehearing of the said decision of November 19, 1920, and said Secretary granted same. That no final decision thereon was ever made by said Secretary, except as hereinafter set forth and said petition for rehearing was pending before said Secretary on November 23, 1921.

IX. That after the passage of said Act of November 23, 1921, and pursuant to regulations promulgated by said Secretary, and on January 9, 1922, relator filed its petition for rehearing, a copy of which petition is attached hereto, made a part hereof and marked Exhibit K.

That thereafter and on March 21, 1923, said Commission duly made its memorandum in review of said claim and recommended that said claim be denied. That a copy of said memorandum is attached hereto, made a part hereof and marked Exhibit L.

X. That thereafter relator applied to said Commission and obtained leave to file additional evidence respecting matters considered in said memorandum and thereafter relator obtained and filed with the said Secretary, the affidavits of C. M. Burleson, J. H. Hart, J. R. Van Fleet, and Jno. B. Huffard, which affidavits are attached hereto, made a part hereof and marked respectively Exhibits M, N, O and P.

That relator also endeavored to obtain the affidavit of W. A. T. Agard, but same could not be obtained because of the very severe illness of said Agard and because thereof relator was not able to obtain same until January 1924, as hereinafter set forth.

That after the filing of said affidavits, relator's claim was again considered and on November 8, 1923, the first Assistant Secretary of the Interior, in a written opinion, denied relator's  
6 motion for a rehearing and rejected the claim. That a copy of said opinion is attached hereto, made a part hereof and marked Exhibit Q.

XI. That thereafter and on December 6, 1923, relator again petitioned for a rehearing and requested and obtained time in which to obtain and present additional evidence; that a copy of said petition is attached hereto, made a part hereof and marked Exhibit R.

That thereafter and in January 1924, relator obtained and filed with said Secretary, the affidavits of W. A. T. Agard and Charles Carpy, copies of which affidavits are attached hereto, made a part hereof and marked respectively Exhibits S and T.

That after the filing of said affidavits, relator's claim was again considered and on March 29, 1924, said First Assistant Secretary, in a written opinion, denied relator's said motion for a rehearing; a copy of said opinion is attached hereto, made a part hereof and marked Exhibit U.

XII. That thereafter relator directed the attention of said First Assistant Secretary to obvious mistakes in his said opinion of March 29, 1924, and said First Assistant Secretary granted a rehearing and directed that relator's claim be again reviewed by said Commission.



That relator's claim was again considered by said Commission and on June 4, 1924, the Commissioner rendered his memorandum in writing, declining to disturb the previous ruling; a copy of said memorandum is attached hereto, made a part hereof and marked Exhibit V.

That thereafter and pursuant to said memorandum by said Commissioner and on June 14, 1924, said First Assistant Secretary, in a written decision, denied relator's petition for a rehearing; a copy of said decision is attached hereto, made a part hereof and marked Exhibit W.

XIII. That thereafter and on June 17, 1924, relator petitioned respondent, in writing, for an oral hearing of said claim and same was granted. That after said oral hearing and July 25, 1924, respondent filed his written decision wherein he refused to reopen the case; copies of which are attached hereto, made a part hereof and marked respectively Exhibits X and Y.

XIV. That thereafter relator directed respondent's attention to an alleged mistake of law in his said decision in the matter of the construction of the said contract of May 10, 1917, and requested and obtained leave to file evidence respecting the intent of the parties to said contract at the time of its making and of the understanding of the parties as to its scope, operation and effect. That thereafter relator obtained, and in the latter part of August, 1924, filed with respondent, the affidavit of said Agard and an original letter from said Huffard, copies of which are attached hereto, made a part hereof and marked respectively Exhibits Z and ZA.

XV. That thereafter respondent claims to have considered relator's said claim in all its aspects and on January 6, 1925, respondent made and filed his final decision in writing and denied the claim; a copy of said decision is attached hereto, made a part hereof and marked Exhibit AA.

XVI. That with one exception, the foregoing Exhibits present all the evidence considered by the Secretary of the Interior and all the decisions or opinions made in the alleged adjustment of said claim #680 under said Acts of Congress.

That the one exception noted is the testimony of W. A. T. Agard, taken before the War Minerals Relief Commission at San Francisco in July 1919. That said testimony is in all respects consistent with and confirmatory of the testimony of said Agard as set forth in his said affidavits and because of its length and because it would be a mere repetition, is not set forth as an Exhibit hereto.

XVII. Relator shows that prior to the passage of the Act of November 23, 1921, the Secretary of the Interior, adjusted and allowed such claims only as resulted from direct or personal request by one of the agencies named in said Act, and refused to adjust or allow any claim resulting from published request by any of said agencies.

That when said Agard appeared before said War Minerals Relief Commission at San Francisco and testified, relator attempted to prove facts establishing published requests to produce chrome prior to July 10, 1917, but said Commission prevented said Agard from testifying



to such facts and then and there announced to relator that such evidence was irrelevant, as direct or personal request only, would be recognized.

That the first published request, justifying an award to claimants under said Act, as amended, and recognized and accepted by the Secretary of the Interior, is the Message of President Woodrow Wilson published for the first time on or about April 16, 1917.

That relator learned for the first time in April 1923, that the Secretary of the Interior had recognized said Message as a published request under said Act of Congress and had made awards thereon to other claimants.

That the only person who could establish published request to relator by reason of said Message, was said Agard. That at that time and during the remainder of the year 1923, said Agard was ill and physically and mentally unable to confer with relator respecting such matter and unable to make an affidavit of any kind for any purpose.

That said Agard was not able to make such affidavit until  
9 January 4, 1924, on which date he made proof of published request to relator by reason of said message as fully appears in his said affidavit Exhibit S attached hereto.

XVIII. Relator shows that it proved to the Secretary of the Interior, without contradiction and with no evidence to the contrary, published request to it on or about April 21, 1917 to produce chrome and that, in compliance with said request, relator prepared to produce chrome and suffered losses as hereinbefore set forth, but said Secretary has failed, neglected and refused to recognize such published request so established and has failed, neglected and refused to make a finding thereon or to adjust relator's claim in any manner.

That the Secretary of the Interior has adjusted, allowed and paid many claims under said Act of November 23, 1921, upon request to claimants established only by the said Message of the President of the United States, as fully appears by the affidavits of claimants and memorandums by said War Minerals Relief Commission, upon which said awards were made, copies of which are attached hereto, made a part hereof and marked Exhibits BB, CC, DD and EE.

XIX. Relator shows that the Secretary of the Interior has adjusted and paid to many claimants, losses suffered by reason of producing said minerals in compliance with said published request of President Wilson, and has denied the same relief to relator upon identical proof; that by reason thereof said Act has not been uniformly and fairly administered by respondent and because thereof, relator has been unjustly and unreasonably and unlawfully discriminated against, and respondent's denial of and refusal to adjust relator's claim upon said published request is therefore an unequal, arbitrary and discriminatory administration of the law, and denies to relator  
the equal protection and security of the laws of the United  
10 States, contrary to the provisions of the due process clause of the fifth amendment of the Constitution of the United States.

XX. Relator shows that the Secretary of the Interior concedes that the Department of the Interior, on July 10, 1917, personally re-



quested relator to produce chrome for the use of the nation in the prosecution of the War and that relator did produce chrome thereafter and suffered losses in so doing, but respondent held and still holds that relator's said losses did not result because of Government request but resulted because of a contract for the sale of chrome, entered into on May 10, 1917, a copy of which contract is attached hereto, made a part hereof and marked Exhibit FF.

XXI. Relator shows that there was and is no dispute of fact between relator and respondent respecting relator's said operations. The uncontradicted facts presented to respondent in support of said claim in substance are:

On or about April 13, 1917, at San Francisco, one Philpot directed the attention of W. A. T. Agard to a chrome property in Tehama County, California, located on what is known as Tedoc Mountain. Philpot represented a large tonnage of high grade chrome that could be easily, quickly and cheaply mined; that the property could be acquired and put on a producing basis by June 15, 1917, and that the total cost thereof, including the purchase price of the property, would not exceed \$8,750.

Philpot represented that a road not exceeding 5 miles in length would have to be built, that the proposed road would be comparatively level, that three miles was practically constructed by nature and that there would be only two miles of road building, and that the cost of the road would not exceed \$3,500.

Agard then sought to interest Carpy, Brown and Stewart  
11 in the proposition with the result that a supposedly competent and reliable mining engineer by the name of Bacon was employed and sent to the property to investigate Philpot's representations and report.

On April 18, 1917, Bacon made his report in writing, confirming Philpot's representations. As a result of Philpot's representations, Bacon's report and the said Message of the President of the United States, and on or about April 23, 1917, said Agard persuaded his said associates to undertake the venture and they then and there agreed upon and organized Tedoc Company, provided the estimated capital, to wit: \$8,750, and thereafter acquired said Tedoc Mountain property; made Philpot superintendent and on *May 3, 1917*, began operations.

No member of Tedoc Company ever visited said Tedoc Mountain property except as hereinafter related.

On *May 10, 1917*, relator entered into a contract in writing (Exhibit FF) with California Chrome Company, whereby it agreed to sell to said Company all chrome, up to 4,000 tons, to be produced from Tedoc Mountain at 60¢ per unit, which, at that time, and for the grade of ore produced by relator from said property, was \$27.00 per ton or \$4.00 per ton in excess of the prevailing market price in California.

That said sales contract so entered into as aforesaid, was on May 10, 1917, necessary and essential to the carrying out of the purpose of the business in which relator was then engaged and that no reason



or condition existed at any time thereafter which justified a cancellation or repudiation of said contract and that at all times relator was legally bound to perform its obligations thereunder, so long as it operated and produced chrome from said Tedoc Mountain.

That on or about June 15, 1917, Philpot advised relator that all funds provided for road construction and operations had been expended; that the road was not completed and that more funds must be provided.

12 Relator immediately sent said Agard to the property to investigate and report.

Said Agard arrived at the mine for the first time on June 22, 1917. He found all money expended, some debts incurred, about three miles of road partially completed and that instead of a five or six mile road, comparatively level, it would require a road approximately 11 miles in length over steep, rugged mountains, to an elevation of over 4,000 feet, costing \$30,000 instead of \$3,500.

Relator thus learned for the first time that both Philpot and Bacon had grossly misrepresented the nature, length and cost of the road necessary to be constructed in order to get out the chrome, and that it would be impossible to begin shipments, under said contract, for three or four months.

Said Agard returned to San Francisco, and reported to his said associates. After due consideration, relator decided to quit business and sell its said property and relator then and there authorized and directed said Agard to go to said property, discharge all employees, pay all debts and sell the property. That in July, 1917, relator could have sold said Tedoc Mountain property and realized a profit over and above all expenditures thus far made.

Whilst this action was being formulated, and unknown to relator, and without its invitation, Dr. J. S. Diller of the United States Geological Survey, heard of Tedoc operations and on July 10, 1917, visited said property and talked with relator's superintendent, Philpot, to its mine foreman, Hart, and with C. M. Burleson, an engineer in charge of a nearby mine, who was at relator's property at the time.

Said Diller went over the road thus far completed. He walked over the route to be completed, he saw, knew and appreciated the difficulties then confronting relator respecting road completion; he examined the ore bodies and after doing so, he then and there strongly urged that relator complete the road and get out the

13 ore as the Government needed same for war purposes. Said

Diller visited relator's property again on July 6, 1918, and for the first time met Mr. Agard. That respecting relator's operations and its efforts to produce chrome as aforesaid, said Diller reported to the Secretary of the Interior as follows, to wit:

“\* \* \* As I was in the field at that time for the U. S. G. S., stimulating the production of chrome ore to supply the needs of the country, I strongly encouraged Mr. Hart, July 10, 1917, in the presence of his wife, to continue his work and develop his producing mine \* \* \*



"On July 5, 1918, I met Mr. Agard at Red Bluff, and his statement concerning our conversation is correct. On July 6, 1918, I visited the Tedoc Mine a second time where I again met Mr. J. H. Hart, and strongly urged him to do his utmost in getting chromite to save the country.

"Mr. J. H. Hart and W. A. T. Agard of the Tedoc Company from the beginning have acted in good faith and with all the stimulation my spoken words could supply.

"The Tedoc Company did all it could to produce the chromite needed to win the war."

That on July 10th or 11th, 1917, said Agard was at Red Bluff, California, on his way to the mine for the purpose of closing down and selling the property. Whilst there, relator's said foreman talked with said Agard over the telephone and told him of Dr. Diller's visit and request.

Said Agard, acting on his own judgment, immediately returned to San Francisco, and reported to relator that Dr. Diller, representing the Department of the Interior, had examined the mine and had personally requested relator to complete the road and get out the chrome as quickly as possible as the Government needed it for war purposes. This information was soon thereafter confirmed to relator, by letter, from said Burleson.

14 That relator then considered Dr. Diller's request and solely and only because of such request and not otherwise, and on or about July 21, 1917, relator abandoned its determination to quit and then and there surrendered the right reserved to it in said contract, to wit: to sell at any time, and then and there decided to comply with the request of Dr. Diller and to continue operations and because of said request, relator then and there changed the plan and scope of its operations as originally planned and intended, and then and there decided to carry on all future operations to the maximum extent of its financial ability and to produce all chrome possible.

Said Agard immediately returned to the mine, reaching there on July 23, 1917, discharged Philpot, made Hart superintendent, ordered intensive operations and the employment of every available man, with the result that said road was completed, so as to permit hauling in the latter part of September, 1917, and before being compelled to close because of winter conditions, relator produced over 500 tons of high grade chrome.

The foregoing facts are fully presented and established by the affidavits of W. A. T. Agard, Chas. Carpy, Eldora Brown, C. M. Burleson, J. H. Hart, J. R. Van Fleet and Jno. B. Huffard, attached hereto as exhibits, which affidavits were presented to and received and considered by the Secretary of the Interior in the alleged adjustment of said claim #680.

XXII. Relator shows that upon the aforesaid facts, but for respondent's said construction of said contract and his conclusion in respect thereto, that respondent would have adjusted and allowed relator's net losses suffered as aforesaid, as in other claims with like proof, as is evidenced by the decision of the Secretary of the Interior



15 in one of such claims, to wit: Salt Lake Tungstania Mines Co., Claim #647, a copy of which is attached hereto, made a part hereof and marked Exhibit GG.

XXIII. Relator shows that it established in said claim as facts, without contradiction—

That said contract was freely and fairly entered into by the parties thereto, that there was no duress, misrepresentation or fraud of any kind or nature and that no reason existed which justified a breach thereof by relator.

That said California Chrome Company only conceded and agreed to buy at the price fixed, to wit: \$4.00 per ton over the prevailing market price, because both parties expected deliveries to begin by June 15, 1917, and a large tonnage delivered during the summer and fall of that year.

That under conditions understood and believed by relator at the time said contract was entered into, same was good, sound business judgment, and such as any prudent business man would have made under like conditions; and relator shows that its operations on Tedoc Mountain are set forth in detail in said claim filed with the Secretary of the Interior and the proof discloses that had there been no misrepresentation respecting said road, that relator would have suffered no loss in its said operations by reason of said contract of May 10, 1917.

That on May 10, 1917, and on July 10, 1917, no work had been done on the ore bodies on said property, no chrome had been blocked out and no deliveries made under said contract; the only known chrome was that exposed by nature and to all external appearances, there was apparently a large body of high grade chrome available.

16 That chrome is one of the most treacherous minerals known to the mining industry as it does not occur with any degree of regularity or dependability; that it is impossible to measure or ascertain with any degree or certainty the quantity of chrome in any exposed or given body, as there is no uniformity of ore body, as is the case with most all other minerals.

That on July 10, 1917, neither relator nor Dr. Diller knew how much ore could or would be produced; that all that could be done in this respect by any person was to exercise his best judgment: that relator exercised its best judgment through the reports made by said Philpot and said Bacon, the observations of said Agard, the opinion of Dr. Diller, and finally and between July 10, 1917, and July 21, 1917, through a report made by said Burleson, who reported to relator that in his opinion there was a sufficiently large and possible ore body as would justify relator in completing the road as requested by Dr. Diller.

That said Tedoc Mountain property contained chrome in sufficient quantities to be of commercial importance.

That on July 10, 1917, and on July 21, 1917, the prevailing market price in California for chrome ore of the grade produced from Tedoc Mountain, was \$24.75 per ton F. O. B., and no more, and this fact was then known to Dr. Diller.



That there was no advance in said prevailing market price for chrome ore until after relator had abandoned its determination to quit operations as aforesaid and after it had committed itself to and had started the enlarged operations requested by Dr. Diller.

XXIV. Relator shows that it proved to respondent, without contradiction, that the parties to said contract, did not on May 10, 1917 or at any other time, intend or understand same to be a firm contract obligating relator to operate said Tedoc Mountain property and deliver chrome in any event; that the practical construction of said contract by the parties thereto, during the time of its execution, indicated clearly that they did not regard said contract as obligating relator to deliver in any event, as more fully appears in said Exhibit Z and ZA.

XXV. Relator shows that it proved to respondent that said contract did not, in fact or as a matter of law, obligate relator to continue operations after discovery of the fraud hereinbefore set out and that said contract did not in fact or as a matter of law, prevent relator from quitting operations as aforesaid.

Relator shows that said contract obligated it to deliver chrome only in the event it produced chrome of specified grade from said Tedoc Mountain and that said contract does not impose a penalty for failure to operate or produce.

XXVI. Relator shows that in construing said contract as aforesaid, respondent ignored uncontradicted facts respecting its scope, operation and effect and relator's rights thereunder and failed, neglected and refused to give effect to specific and exact language in said contract reserving to relator an alternative right to wit: the right to sell at any time subject to said contract;—relator therefore shows that respondent's said ruling or decision is arbitrary, capricious and contrary to law.

XXVII. Relator shows that it established as a fact, without contradiction, in the said claim, that said contract was lawful and was freely and fairly entered into and that it was proper and necessary for carrying on the said business in which relator was then engaged, and that respondent has recognized and accepted said contract in part, as such.

Relator shows that under the guise of alleged executive construction of said contract, respondent, has, in effect, executively legislated out of said contract a right expressly reserved to relator, to wit: the right to sell.

18 Relator shows that the practical effect thereof is the impairment of a lawful contract in that it nullifies, destroys and abrogates said contract in part.

Relator shows that respondent's neglect or refusal to adjust relator's said losses and make findings in respect thereof, is predicated upon his said alleged construction of said contract and his failure, neglect and refusal to recognize and respect all relator's rights thereunder and that by reason thereof respondent has impaired the obligation of a valid contract and has denied to relator the right to enter into and keep according to its terms, a necessary and proper contract for



carrying on the said business, contrary to the provisions of the fifth amendment of the Constitution of the United States.

Relator further shows that if respondent be compelled to recognize and accept said contract in its entirety and respect relator's rights thereunder, that the facts established as hereinbefore set forth, are in all respects sufficient under said Acts of Congress and entitle relator to an adjustment of its net losses suffered as aforesaid.

XXVII. Relator shows that after it had abandoned or surrendered its right to sell and quit and had decided to continue operations as above recited and solely and only because of the direct personal request of Dr. Diller as aforesaid and solely and only to aid the United States at war, relator, in August 1917, in good faith acquired and operated the Paskenta Mine and produced chrome therefrom, all of which is fully set forth in detail in said claim filed with respondent.

That likewise and solely and only because of the direct personal request of Dr. Diller as aforesaid and solely and only to aid the United States at war, relator, in February 1918, in good faith, acquired and operated the McArthur and Shawn Mines and produced chrome therefrom, all of which is fully set forth in detail in said claim filed with respondent.

That said Paskenta and McArthur and Shawn Mines contained chrome in sufficient quantities to be of commercial importance.

That the chrome produced from the Paskenta Mine and said McArthur and Shawn Mine, was not covered by the said contract of May 10, 1917 and same was sold by relator at prevailing market prices at the time of delivery.

That by reason of acquiring and producing from said Paskenta and said McArthur and Shawn Mines, relator suffered net losses, as more fully appears in the itemized claim filed with respondent, but that respondent has failed, neglected and refused to consider or adjust said losses in any manner and has failed, neglected and refused to make any finding whatever in respect thereto or make any award therefor.

XXIX. That respondent has refused and still refuses to consider or adjust relator's net losses suffered as in said claim set forth and has refused and still refuses to make a finding of any kind respecting said losses and has taken no action in respect thereto, save as a matter of law, to arbitrarily reject or deny same.

Relator shows that respondent's said refusal is a clear mistake and a plain misunderstanding of the intent of Congress as expressed in the unambiguous terms of said Section 5 of the Act of March 2, 1919, as amended.

XXX. Relator has no other remedy at law or in equity to correct respondent's arbitrary refusal to recognize published requests to relator as of April 21, 1917 and his failure, neglect and refusal to make a finding as to whether relator did or did not suffer net losses as aforesaid, and relator therefore avers that respondent's nonaction or refusal to act respecting the matters herein complained of is an evasion of a duty imposed by said Act of Congress and can only be reviewed and his disregard of the law corrected, only by mandamus.



Wherefore relator prays:

(a) That a writ of mandamus may be issued directing respondent, Hubert Work, Secretary of the Interior, to consider and adjust relator's claim:

For expenditures made and obligations incurred in good faith in producing and preparing to produce chrome at the request of the President of the United States and the Department of the Interior and to justly and equitably ascertain, adjust and declare such net losses, if any, thus arising.

(b) That in the event respondent finds that relator has suffered net losses thereby, as in said Act provided, that he be directed to allow and pay same.

(c) That a rule may issue requiring respondent, Hubert Work, Secretary of the Interior, to show cause, if any he can, why the writ of mandamus should not issue herein as prayed.

F. E. SCOTT,  
*Attorney for Relator.*

A. H. JARMAN,  
*Of Counsel.*

21 STATE OF CALIFORNIA,  
*County of Alameda, ss:*

W. A. T. Agard being first duly sworn deposes and says:

That he is one of the associates or copartners of Tedoc Company, relator in the foregoing petition; that during the entire period of operations conducted by said Tedoc Company affiant acted as general manager and had knowledge of all its affairs; that affiant has had charge of said claim No. 680 before said Secretary of the Interior and has kept informed of all proceedings before said Secretary and therefore makes this verification in behalf of said Tedoc Company and his associates; that affiant has read the foregoing petition and knows the allegations therein and that the same are true.

W. A. T. AGARD.

Subscribed and sworn to before me this 13th day of February, 1925.

[SEAL.]

F. C. BISHOP,  
*Notary Public of the State of California  
in and for the County of Alameda.*

22 EXHIBIT A.

*Section 5 of the Act of Congress Entitled "An Act to Provide Relief in Cases of Contracts Connected with the Prosecution of the War and for Other Purposes," Approved March 2, 1919.*

"Section 5. That the *Secretary of the Interior* be, and he hereby is, *authorized to adjust, liquidate, and pay such net losses* as have been suffered by any person, firm, or corporation, by reason of produc-

ing or preparing to produce, either manganese, chrome, pyrites, or tungsten in compliance with the request or demand of the Department of the Interior, the War Industries Board, the War Trade Board, the Shipping Board, or the Emergency Fleet Corporation to supply the urgent needs of the nation in the prosecution of the war; said minerals being enumerated in the Act of Congress approved October fifth, nineteen hundred and eighteen, entitled 'An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of those ores, metals and minerals which have formerly been largely imported, or of which there is or may be an inadequate supply.'

*"The said Secretary shall make such adjustments and payments in each case as he shall determine to be just and equitable; that the decision of said Secretary shall be conclusive and final, subject to the limitation hereinafter provided; that all payments and expenses incurred by said Secretary, including personal services, traveling and subsistence paid, \* \* \* until such time as the said Secretary shall have fully exercised the authority hereing granted, and performed and completed the duties hereby provided and imposed.—Provided however, that the payments \* \* \* shall in no event exceed the sum of \$8,500,000: And provided further, that the said Secretary shall consider \* \* \* such claims \* \* \* filed \* \* \* within three months \* \* \*. And provided further, that no claim shall be allowed or paid by said Secretary unless it shall appear to the satisfaction of the said Secretary that the expenditures so made*

23 *or obligations so incurred by the claimant were made in good faith for or upon property which contained either manganese, chrome, pyrites, or tungsten in sufficient quantities to be of commercial importance: And provided further, that no claims shall be paid unless it shall appear to the satisfaction of said Secretary that moneys were invested or obligations were incurred subsequent to April 6, 1917, and prior to November 12, 1918, in a legitimate attempt to produce either manganese, chrome, \* \* \* for the needs of the nation for the prosecution of the war, and that no profits of any kind shall be included in the allowance of any of said claim, and that no investment for merely speculative purposes shall be recognized in any manner by said Secretary. \* \* \**

That nothing in this section shall be construed to confer jurisdiction upon any Court to entertain a suit against the United States: Provided further, that in determining the net losses of any claimant the Secretary of the Interior shall, among other things, take into consideration and charge to the claimant the then market value of any ores or minerals on hand belonging to the claimant, and also the salvage or usable value of any machinery or other appliances which may be claimed was purchased to equip said mine for the purpose of complying with the request or demand of the agencies of the Government above mentioned in the manner aforesaid."



24

## EXHIBIT B.

*An Act to Amend Section 5 of the Act Approved March 2, 1919, Entitled "An Act to Provide Relief in Cases of Contracts Connected with the Prosecution of the War and for Other Purposes."*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Section 5 of the Act approved March 2, 1919, entitled "An Act to provide relief in cases of contracts connected with the prosecution of the War, and for other purposes," be, and the same is hereby, amended as follows:

Add to the first paragraph of Section 5 the following proviso:

Provided, that all claimants who, in response to any personal, written, or published request, demand, solicitation, or appeal from any of the Government agencies mentioned in said Act in good faith expended money in producing or preparing to produce any of the ores or minerals named therein and have heretofore mailed or filed their claims or notice in writing thereof within the time and in the manner prescribed by said Act, if the proof in support of said claims clearly shows them to be based upon action taken in response to such request, demand, solicitation or appeal, shall be reimbursed such net losses as they may have incurred, and are in justice and equity entitled to from the appropriation in said Act.

If in claims passed upon under said Act awards have been denied or made on rulings contrary to the provisions of this amendment, or through miscalculation, the Secretary of the Interior may award proper amounts or additional amounts."

Approved November 23, 1921.

25

## EXHIBIT C.

May 14, 1920.

The Honorable the Secretary of the Interior.

DEAR SIR:

Claim No. 680. In the Matter of the Claim of Tedoc Company, San Francisco, California.

This is a claim for loss alleged to have been sustained in mining chrome. On April 13, 1917, Charles Carpy, F. H. Stewart, W. A. T. Agard and James Brown associated themselves together under the name of the Tedoc Company to operate certain chrome properties situated in Tehama County, California. Upon the death of James Brown, his interest *deverted* to Eldora Brown. Properties operated were known as Tedoc Mine, Paskenta Mine, McArthur and Shawn Mine.

On May 10, 1917 claimants entered into a contract with the California Chrome Company in which they agreed to ship 4,000 tons of chrome ore during the year 1917, at a price of 60¢ per unit on ore

averaging 40% or better. In case claimants failed to ship the full 4,000 tons during 1917, the California Chrome Company had the right to purchase all of the unfilled tonnage at the same price during the year, 1918.

Section 5 of the Act, under which this claim is filed, provides as follows:

"That the Secretary of the Interior be, and he hereby is, authorized to adjust, liquidate, and pay such net losses as have been suffered by any person, firm, or corporation, by reason of producing or preparing to produce, either manganese, chrome, pyrites, or tungsten *in compliance with the request or demand* of the Department of the Interior, the War Industries Board, the War Trade Board, the Shipping Board, or the Emergency Fleet Corporation. \* \* \*"

The Solicitor of the Department, in an opinion furnished for the benefit of this Commission, made the following comment:

26 "There must have been a specific request or demand communicated personally in some form to an individual, who, *as a consequence thereof*, produced or prepared to produce, manganese, chrome, pyrites or tungsten. \* \* \*"

On July 15, 1917, Mr. Diller visited claimant's property and upon inquiry regarding said visit states: "I strongly encouraged Mr. Hart (claimant's superintendent) in the presence of his wife, to continue his work and develop his producing mine." It is not shown that claimants or Mr. Hart contemplated discontinuance of the work.

In order to entitle the claimants who were already operating at the time of the "request or demand" to an award under the Act, it is not sufficient merely to show that such "request or demand" was made, and that certain losses thereafter accrued, but it must appear that claimants incurred losses which they would not have incurred had they not been influenced by some Government agencies named in the Act.

Previous to July 5, 1917, — date on which Dr. Diller visited claimant's properties claimants had entered into a contract with the California Chrome Company to produce and ship 4,000 tons of ore during the year 1917. They had expended \$7,052.81 on property and \$8,961.14 on a road over which to transport the ore contracted to be mined and shipped, this road being ten and three-quarter miles in length. At the time of Mr. Diller's visit, this road had only been one-third constructed and was not completed until the fall of 1917.

Up to November 11, 1918, claimants had shipped 1490 of the 4,000 tons contracted for and did not ship any after that date.

It is evident that on July 5, 1917, the date of Mr. Diller's visit, the claimants were already fully committed, by their contract  
27 with the California Chrome Company, to a plan of development and operation, which could not have been changed, except by the permission of the California Chrome Company.

They were obliged by their sales contract to sell their output at a price far below the prevailing market prices at the time their product was shipped.



Mr. Diller did not, and could not, have changed this contract and the loss of the claimants was not increased by reason of his visit.

The following tabulation shows expenditures made previous to the date of alleged stimulation, from that date until November 12, 1918 and subsequently:

|                              | May,<br>1917, to<br>Jul. 5, 1917. | July<br>5, 1917-<br>Nov. 12, 1918. | After<br>Nov. 12/18. | Total.              |
|------------------------------|-----------------------------------|------------------------------------|----------------------|---------------------|
| Mining Expense .....         | .....                             | 17,461.84                          | 64.00                | 17,525.84           |
| Assaying .....               | .....                             | 114.                               | .....                | 114.00              |
| General Expense .....        | 7.79                              | 1,837.67                           | .....                | 1,845.46            |
| Office Expense .....         | 83.24                             | 670.76                             | 7.13                 | 761.13              |
| Hauling and Loading .....    | .....                             | 18,355.87                          | .....                | 18,355.78           |
| Platform and Bunkers .....   | .....                             | 1,774.83                           | .....                | 1,774.83            |
| Boarding House .....         | .....                             | 921.35                             | .....                | 921.35              |
| Equipment & Live Stock ...   | .....                             | 6,649.91                           | .....                | 6,649.91            |
| Road Maintenance .....       | .....                             | 795.24                             | .....                | 795.24              |
| Tools .....                  | .....                             | 87.30                              | .....                | 87.30               |
| Camp Equipment .....         | .....                             | 1,433.37                           | .....                | 1,433.37            |
| Truck Expense .....          | .....                             | 1,187.13                           | .....                | 1,187.13            |
| Operating Cost .....         | 91.03                             | 51,289.27                          | 71.13                | 51,451.43           |
| Less Credits (Schedule 7) .. | .....                             | 56,803.00                          | .....                | 56,803.00           |
|                              | 91.03<br>Loss.                    | 5,513.73<br>Profit.                | 71.13<br>Loss.       | 5,351.57<br>Profit. |
| Miscellaneous Accounts:      |                                   |                                    |                      |                     |
| Road Work .....              | 8,961.14                          | 16,826.49                          | .....                | 25,787.63           |
| Property .....               | 7,052.81                          | 115.75                             | .....                | 7,168.56            |
| Personal & Traveling .....   | 370.85                            | 2,952.61                           | 18.07                | 3,341.53            |
| San Francisco Office.....    | 129.00                            | 863.50                             | 107.35               | 1,100.84            |
| Engineer .....               | .....                             | 352.05                             | .....                | 352.05              |
| Legal .....                  | .....                             | 170.00                             | .....                | 170.00              |
| Overland Auto Expense ....   | .....                             | 648.94                             | .....                | 648.94              |
| Interest .....               | .....                             | 106.32                             | 3,946.79             | 4,053.11            |
|                              | 16,514.79                         | 22,035.66                          | 4,072.21             | 42,622.66           |

28 In view of the facts as above outlined, it is evident that claimants did not incur a loss due to the request of Mr. Diller, and that all expenditures made after date of such request were necessary to the carrying out of the contract with the California Chrome Company, and it is, therefore, recommended that no award be made on this claim.

JOHN F. SHAFFROTH,  
PHILIP N. MOORE,  
HORACE G. POMERY,  
*Commissioners.*

29

## EXHIBIT D.

Department of the Interior,  
War Minerals Relief Commission,  
Washington, D. C.

In the Matter of the Claim of TEDOC COMPANY, San Francisco, Calif.  
Claim No. 680.

STATE OF CALIFORNIA,

*City and County of San Francisco, ss:*

W. A. T. Agard, being first duly sworn, depose and says:

That he is a resident of the County of Alameda, State of California and at all times since the organization of Tedoc Company has been a member thereof.

That Tedoc Company is a voluntary association and was organized in April 1917, by Charles Carpy, now in France, James Brown, now deceased, F. H. Stewart and affiant; that at all times since its organization affiant jointly with the said James Brown has had the active management and control of its affairs.

That affiant has read and carefully considered the conclusions of the Commission denying relief and respectfully submits that the result does a serious injustice not only to claimant, but to the government as well. Affiant believes, however, that the denial of relief is due to the fact that this Commission did not have *all* the facts before it and particularly the facts which induced claimant to continue the vital representations which induced it to engage in the business *was false*; and in this behalf affiant desires to make it clear  
30 to the *the* Commission that claimant could have and would have *abandoned* the enterprise in July, 1917, but for the request of Dr. J. S. Diller, made in the early part of that month that claimant continue to work and get out the ore as it was needed for war purposes. In order to advise the Commission fully of all the facts, affiant submits:

That in the month of April, 1917, one Philpot directed affiant's attention to certain alleged chrome properties in Tehama County, California, and stated to affiant and to said Stewart, that a large tonnage of high grade chrome ore could be easily and cheaply mined there and requested said Stewart and affiant to secure the necessary capital and take over the property and operate same. Philpot had theretofore been presented to affiant by responsible people as a man of integrity and a mining man of ability and affiant and his associates in said Tedoc Company so believed until discovery to the contrary as hereinafter set forth.

Philpot stated to affiant and said Stewart that the greatest expense connected with the development of the property would be the con-



struction of a road approximately five miles in length, three miles of which he stated were almost level and would require little expense to make into a first class road. He also stated that the total cost of building said road would be about the sum of \$3,500 and in no event would it exceed \$5,000.

Thereupon affiant made all possible investigations with the exception that he did not visit the property. As the result thereof, affiant and Stewart were convinced of the truth of Philpot's statements and relying thereon interested Carpy and Brown in the Property. A supposedly competent engineer was sent to the property to verify Philpot's representations.

Neither affiant nor any of his said associates at that time in any way questioned or doubted the representations of Philpot  
31 either as to the length or cost of the road.

That said engineer examined said mining property in April 1917, and reported to affiant that there was a large deposit of high grade chrome ore on the property with a very large possible tonnage and recommended it as worthy of development. Said engineer also reported as follows:

"Nothing stands in the way of a good practical road being constructed from the County road to a property at a distance of about six miles."

That relying on the representations of Philpot and the report of the said engineer, Tedoc Company was formed and the necessary capital furnished by Carpy and Brown, all of which more fully appears in the written agreement attached to and made a part of the claim herein. A tentative agreement was entered into, operations commenced with Philpot as superintendent.

Until affiant's visit as hereafter related, neither affiant nor any of his said associates had ever examined the said mining property. All depended upon the statements of Philpot and the report of the said engineer.

On June 22nd, 1917, affiant for the first time visited the mining property and for the first time learned that in order to get out the ore it would be necessary to build a road approximately *eleven miles in length over rough, rugged mountains at a cost of seven or eight times the amount stated by Philpot*. Affiant found approximately three miles of the proposed road partially completed and more than the original estimated sum for road purposes already expended. Affiant, although not a mining engineer, from what he observed of the ore bodies felt convinced that the possibilities of a very large ore body might be reasonably expected.

Affiant immediately returned to San Francisco and re-  
32 ported the result of his investigations to his said associates, particularly road conditions and probable cost of completion.

Carpy and Brown then and there declined to finance the enterprise further and then and there announced that they were through and requested affiant to effect a sale of the property or interest others in their place.

At or about this time, affiant learned that Dr. J. S. Diller of the U. S. G. S. was in California actively encouraging the production of chrome ore as a war necessity. Affiant gave this information to Carpy and Brown and urged it as a reason why they should continue with the enterprise and finance it even to the extent of completing the road at a cost of \$30,000—the amount estimated by affiant.

That at or about this time, to-wit, on or about July 10th, 1917, Dr. Diller visited the Tedoc property and examined the deposit of chrome ore thereon and then and there urged Philpot, claimant's superintendent and Hart, claimant's foreman, to continue to work and develop the mine, as the government must have chrome ore in order to win the war. Philpot immediately reported Dr. Diller's visit and his said statements to affiant and his said associates.

That as a result of Dr. Diller's visit to the property and particularly his statements concerning the necessity for an increased production of chrome ore, affiant was able to persuade Carpy and Brown to send an engineer to make a survey of the road and an estimate of its probable cost and also ascertain whether or not the property would justify the completion of the road. Accordingly an engineer was sent to the property for that purpose and on July 12th, 1917, made his report thereon and confirmed affiant's estimate as to the probable cost of completion.

That as a result of the foregoing facts and circumstances and particularly Dr. Diller's visit to the property, his approval of  
33 same and his statements that an increased production of chrome ore was necessary as a war commodity, affiant succeeded in persuading Carpy and Brown that as loyal citizens they should finance claimant so as to enable it to complete the road and get out the ore.

Affiant states without equivocation, evasion or reservation, that but for the visit of Dr. Diller to the property, his approval of same, and his statements to Philpot and Hart, all of which were at the time immediately reported to affiant and his said associates, that Carpy and Brown would then and there have quit the enterprise and sold the property.

Affiant further states that at the time of Dr. Diller's visit, not more than three miles of said road had been partially completed. That the necessity of completing the road in order to get out the ore was *obvious*. It was not only known to but was appreciated by Dr. Diller and in this regard affiant states that *Dr. Diller's request to continue the work related more particularly to the completion of the road* than to further work on the mine, as there was at that time apparently a large tonnage of ore in sight that could be easily and quickly mined.

That after receiving the report of said engineer and learning of Dr. Diller's visit to the property and of his conversation with Philpot and Hart, Carpy and Brown yielded to the persuasion of this affiant and agreed to finance claimant in order that said road might be completed and accordingly on July 23, 1917, affiant again went to the property, discharged Philpot and made Hart superintendent.



Affiant directs attention to the conclusion reached in the award that Tedoc Company on July 5th, 1917 was

"already fully committed by their contract with the California Chrome Company to a plan of value and operation which could not have been changed except by the permission of the California Chrome Company."

34 and in this connection affiant states that the contract for the sale of the ore to said California Chrome Company *did not* in any way commit or bind claimant to complete the road or deliver any ore. Claimant merely agreed to deliver all ore mined to said Chrome Company. No penalties attached if none was delivered. Under the alleged contract claimant was at liberty to stop the development of its chrome mine at any time or sell same if it so desired.

It is not true therefore that claimant could not have changed its policy except by permission of the California Chrome Company; furthermore affiant states that at the time he made said alleged contract with said California Chrome Company that the price fixed was the highest prevailing market price and under existing conditions was believed to be sufficient to cover all expenses connected therewith and net a fair margin of profit. After discovery of actual road conditions, said California Chrome Company freely and voluntarily made an additional allowance to claimant of \$1.00 per ton on all ore delivered and later made a further allowance of \$1.00 per ton; furthermore as unforeseen difficulties of completing said road and of mining and transporting the ore became a reality and the price of labor and materials increased and became more difficult to obtain, said California Chrome Company, to-wit, on January 23rd, 1918, voluntarily increased its offer to \$1.00 per unit for ore over 40% and under 50% and \$1.05 per unit for 50% and better; a voluntary increase of more than \$20 per ton.

At all times said California Chrome Company encouraged the development of the property and assured affiant that it could be relied upon to do the right thing as to price.

On December 27th, 1917, Mr. J. B. Huffard, the President of said company wrote to claimant as follows:

35 "During these time- of high pressure when all industry is bent toward prosecution of the war, we in the chrome business, are uniting in hope that the nation will have no reason to complain of the production of this essential raw material for which we are all responsible."

That said California Chrome Company freely and voluntarily assisted claimant in every way and more than made good its representations.

In conclusion affiant states that claimant would have discontinued operations and closed down in July 1917, but for Dr. Diller's visit to the property aforesaid; that Carpy and Brown consented to finance claimant only after being advised by affiant that ore was needed by the Government in order to win the war and that Government officials were in the field requesting increased production.

Affiant further states that between July 12, 1917 and July 22, 1917, Carpy and Brown seriously considered closing down and selling the property and during this period they repeatedly urged upon affiant the advisability as a business proposition, to sell and in this connection affiant states: That at any time between July 1, 1917, and September 1, 1918, claimant could have sold said property for a sum sufficient to have reimbursed claimant for all expenditures made and it is affiant's belief that said property could have been sold at a profit.

When affiant appeared as a witness before the Commission on July 17, 1919, he believed that claimant's cause, as to request and demand, was covered by the said visit of Dr. Diller, as claimant's property was one of the first visited by Dr. Diller and claimant was one of the first chrome operators in California to be urged by Dr. Diller to continue operations, else affiant would have at that time recited all the foregoing facts in detail.

Affiant directs attention to the tabulations by the Commission from which it is claimed that claimant suffered no losses. The conclusion reached is unjust and unfair in that the Government takes advantage of *all the returns* from the sale of ore transported over this road completed at an additional cost of some \$20,000 after  
36 Dr. Diller's visit, without making any allowance for the cost of or even the use of the road for transporting the ore and without the road no ore could have been marketed.

In conclusion affiant stated that his interest herein in the event an award is made will be trifling as compared with the interest of Carpy and Brown and in this connection affiant states that if his interest alone was concerned, that he would not bother further with this matter; that his only interest in pursuing this matter and in presenting this affidavit is to advise the Commission fully and fairly of all the facts and circumstances in order that justice might be done to Carpy and Brown.

Mr. Charles Carpy is now in France, his address being: c/o Comptoir National D'Escompte de Paris, 14 Rue Bergere, Paris, France.

Mr. Brown is dead, his interest in Tedoc Company having been assigned by him just prior to his death, to his wife.

Affiant therefore respectfully urges in behalf of claimant a reconsideration of its award and respectfully submits that claimant is clearly entitled *not only* to the losses suffered by it from July 5, 1917, *but all the losses suffered from the beginning of its operation* because had not claimant been influenced by the able efforts of and their confidence in Dr. Diller, no losses would have been suffered as claimant could have and would have sold its property at a profit before undertaking the completion of said road.

Further affiant sayeth not.

W. A. T. AGARD.

Subscribed and sworn to before me this 6th day of July, 1920.

[SEAL.]

FLORA HALL,

Notary Public in and for the City and County  
of San Francisco, State of California.



37

## EXHIBIT E.

Department of the Interior,  
War Minerals Reliefs Commission,  
Washington, D. C.

In the Matter of the Claim of TEDOC COMPANY, San Francisco, Calif.  
Claim No. 680

*Affidavit of Charles Carpy, Supporting Application for Rehearing.*

REPUBLIC OF FRANCE,

*United States Consulate General,*

*City of Paris, Republic of France, ss:*

Charles Carpy, being first duly sworn, deposes and says:

That he is a resident of St. Helena, County of Napa, State of California, but is presently sojourning in Paris, France.

That affiant is one of the members of said Tedoc Company and interested in the claim filed before said War Minerals Relief Commission.

That affiant has read the affidavit of W. A. T. Agard submitted in support of a rehearing herein and knows the contents thereof, a copy of which is attached hereto and made a part hereof and marked "Exhibit A."

Affiant states that said affidavit sets forth the facts fully and accurately concerning the origin and early history of Tedoc Company as understood by affiant at the time.

Affiant further states that neither he nor his late associate, James Brown would have continued with the development of the property in July, 1917, except for the fact that Dr. J. S. Diller of the United States Geological Survey visited the said chrome property and approved same and urged that claimant continue with the work, also reliable information submitted to affiant and said Brown at the time to the effect that the United States Government was actively encouraging an increased production of chrome ore and that same was necessary for munitions of war purposes.

Affiant states most emphatically that the financing of claimant by affiant and said Brown, after the discovery of the misrepresentations made by Philpot as to the length and cost of the road was due entirely to the stimulation by the United States Government as aforesaid.

And further affiant sayeth not.

[SEAL.]

CLEMENT S. EDWARDS,  
CHARLES CARPY.

Subscribed and sworn to before me this 3rd day of August 1920.

*Consul of the United States  
of America at Paris, France.*

Copy of Exhibit D attached.

39

## EXHIBIT F.

Department of the Interior,  
War Minerals Relief Commission,  
Washington, D. C.

In the Matter of the Claim of TEDOC COMPANY, San Francisco, Calif.  
Claim No. 680.

*Affidavit of Eldora Brown Supporting Application for Rehearing.*

STATE OF OREGON,  
County of Multnomah, ss:

Eldora Brown, being first duly sworn, deposes and says:

That she is a resident of the City and County of San Francisco, State of California, but is presently sojourning in the City of Portland, State of Oregon.

That affiant is now one of the members of said Tedoc Company, having acquired the interest of her late husband, James Brown.

That in his life time Mr. Brown conferred with affiant concerning all his business matters and particularly concerning the affairs, etc. of claimant and affiant was present on many occasions when the business affairs of claimant were discussed by Carpy, Brown, Agard and Philpot. That said Philpot stated to Carpy, Brown and Agard in April, 1917, that the cost of the road to the said chrome deposits would be about \$3,500 and would not exceed \$5,000.

That affiant knows of her own knowledge and states that neither Carpy nor her late husband would have engaged in the said enterprise, had they known or understood that the cost of said road would have exceeded the estimate submitted by Philpot. Affiant further states that she knows of her own knowledge that in the beginning, Carpy, Brown and Agard relied implicitly upon the statements of Philpot.

Affiant states that Carpy and Brown would have abandoned the said enterprise on or about the 1st day of July, 1917, when they learned from Mr. Agard that the road had not been completed and that it would cost about eight times as much as Philpot represented it would cost, had it not been for the efforts of Mr. Agard and particularly the fact that Dr. Diller had visited and approved the chrome property.

Mr. Agard frequently urged Carpy and Brown to continue with the development of the property and affiant heard Mr. Agard state to Carpy and Brown that the government was urging an increased production of chrome ore. Affiant also heard and knew at the time that Dr. Diller representing the government had visited the property and approved same, and had urged the building of the road so that the property could be made into a producing chrome mine.



Affiant also knows of her own knowledge and so states that the representations by Dr. Diller were the controlling influences inducing Carpy and Brown to continue the project and that but for said representations, Carpy and Brown would have either abandoned same or sold out.

Affiant frequently heard her late husband say that most assuredly it was the government's stimulation that made them continue.

That affiant has read a copy of the affidavit of W. A. T. Agard submitted and states that said affidavit sets forth the facts fully and accurately concerning the origin and early history of Tedoc Company, as understood by affiant at the time.

And further affiant sayeth not.

ELDORA BROWN.

Subscribed and sworn to before me this 10th day of July, 1920.

[SEAL.]

ELLEN R. HINDS,  
*Notary Public in and for the County  
of Multnomah, State of Oregon.*

My commission expires November 23, 1921.

41

EXHIBIT G.

Department of the Interior,  
War Minerals Relief Commission,  
Washington,

August 19, 1920.

The Tedoc Mining Company,  
268 Market Street,  
San Francisco, California.

GENTLEMEN:

Claim No. 680. Tedoc Mining Company, San Francisco, Calif.

On May 14, 1920, this Commission recommended to the Secretary of the Interior, that no award be made in your claim. On July 6, 1920, A. H. Jarman, your attorney, filed with us, affidavits of Eldora Brown, Charles Carpy, and W. A. T. Agard.

The contract for the delivery of 4,000 tons of ore was made before Government stimulation by Dr. Diller, July 1917. The Tedoc Company were virtually committed by this contract to the operations which they carried on after Mr. Diller's visit. This is substantiated by the fact that they sold ore under this contract at a price much below the prevailing market price. The losses sustained after the visit of Mr. Diller on July 5, 1917, were largely on account of the failure of the claimants to receive the full market price of chrome, which existed at that time. From the auditor's statement, we esti-

mate that the losses, if allowed, between July 5, 1917 and November 12, 1917, would be as follows:

|                             |             |
|-----------------------------|-------------|
| Operating Cost .....        | \$51,289.27 |
| Road Work .....             | 16,826.49   |
| Personal and traveling..... | 2,952.61    |
| San Francisco Office.....   | 863.50      |
| Engineer .....              | 352.05      |
| Auto Expense .....          | 106.32      |
|                             | <hr/>       |
|                             | \$72,390.24 |
| Ore Sales .....             | \$56,803.00 |
| Salvage—engineer's est..... | 2,731.66    |
|                             | <hr/>       |
|                             | 59,534.66   |
|                             | <hr/>       |
| Net loss .....              | \$12,855.58 |

42 The engineer, in his report on this claim, makes a statement, as follows:

“The prevailing market price for 45% ore (the claimant's average for 1917) during the fall of 1917 was \$1.00 per unit or \$45.00 per ton. The claimant sold his ore during 1917 for an average price of \$29.30. There was a loss of \$15.70 per ton—the shipments for 1917 totalling 563.21 tons of 45% ore, the loss on account of the contract was accordingly \$8,842.39 for 1917.

“During 1918 the sale price was \$1.00 per unit for all ore sold. The average grade was 44%. The average price per ton received for sales of 798.86 tons of 44% ore was \$44.00 per ton. Inasmuch as the market price at the time the 1918 contract was agreed on was \$1.25 per unit for ore of this grade, or \$55.00 per ton, the claimant sustained a loss of \$11.00 per ton in the sale of 798.86 tons of 44% ore.

“The total loss in the sales of ore as a result of poor business judgment during 1918 is \$8,787.46. The total loss for 1917 and 1918 is \$17,629.65, which results from the lowest contract the engineer has observed on examination of any claim.”

It will be seen, from this statement, that the claimants' contract with the California Chrome Company, resulted in their receiving \$17,629.85 less than the full market price for chrome ore, which existed during 1917 and 1918. The losses in producing chrome, which are shown in the auditor's statement are \$12,855.58. Therefore, had the claimants received a market price for their mineral, there would have been no loss.

In our opinion, the losses resulted from the low price received for the ore and were not due to Government stimulation.

Very truly yours,

JOHN F. SHAFROTH,  
PHILIP N. MOORE,  
HORACE C. POMEROY,  
*Commissioners.*



43

## EXHIBIT H.

Department of the Interior,  
Washington.

In re TEDOC COMPANY. Claim No. 680.

October 26, 1920.

The above is a claim under the War Minerals Relief Act, section 5, act of March 2, 1919 (40 Stat., 1274). The law authorizes compensation for losses incurred in the production of chrome during the war due to stimulation by the Government.

I have considered the record and the objections filed but find that the loss here was not due to such stimulation.

The claim is rejected and no award is made.

(Sgd.)

PAYNE.

44

## EXHIBIT I.

Department of the Interior,  
Washington, D. C.

In the Matter of the Claim of TEDOC COMPANY, San Francisco, Calif. War Minerals Relief Commission. Claim No. 680.

*Petition for Rehearing.*

Claimant respectfully petitions for a rehearing herein from the award made by the Secretary of the Interior October 26, 1920, upon the following grounds:

1. Said award is contrary to the evidence and the conceded facts and therefore contrary to the Act of March 2, 1919, (40 Stat. 1274) under which these proceedings are pending.

2. Said award arbitrarily deprives claimant of its property without due process of law.

3. Said award not only impairs but actually destroys a valid contract, to wit, the contract between claimant and California Chrome Company.

4. Said award denies the right of entering into a lawful and proper business contract and keeping same in accordance with its terms.

5. Said award denies the inherent and inalienable right of lawfully acquiring and possessing property and having it protected.

6. Said award destroys vested rights in and to a valid contract and arbitrarily denies claimant's vested rights under the said Act of March 2, 1919.

7. Specifications 2 to 6 inc. are denials of rights guaranteed claimant by the Constitution of the United States.

45        Wherefor- claimant submits that the award denying relief is erroneous and contrary to the said Act of Congress and violative of claimant's inherent and inalienable rights guaranteed by the Constitution of the United States.

Dated November 9, 1920.

Respectfully submitted,

A. H. JARMAN,  
*Attorney for Claimant.*

46

EXHIBIT J.

Department of the Interior,  
Washington.

November 19, 1920.

Mr. A. H. Jarman,  
Attorney-at-law,  
Merchants National Bank Bldg.,  
San Francisco, Calif.

DEAR MR. JARMAN:

I have considered your petition for rehearing in the matter of claim No. 680, filed under the War Minerals Relief Act by the Tedoc Company, which was rejected by my decision of October 26, 1920, because the loss was not due to stimulation by the Government.

The salient facts are that the property was visited July 10, 1917, by Mr. J. S. Diller of the Geological Survey and such was the earliest possible date of governmental stimulation. Upon May 10, 1917, the Tedoc Company entered into a contract to deliver four thousand tons of chrome ore to the California Chrome Company. The claimant was, therefore, committed to an enterprise of that scope prior to any stimulation and no increase in its operation or expenditure was due to any action of the United States. The loss was occasioned because the price fixed for the ore in this contract was lower than the market. Such a loss cannot be attributed to the Government.

The petition for rehearing is denied.

Cordially yours,

JOHN BARTON PAYNE,  
*Secretary.*



47

## EXHIBIT K.

Department of the Interior,  
Washington, D. C.

In the Matter of the Claim of TEDOC COMPANY, San Francisco,  
Calif. War Minerals Relief Commission. Claim No. 680.

*Petition for Rehearing.*

As to Government stimulation and claimant's good faith in the operations resulting in the loss complained of, Honorable J. S. Diller of the U. S. G. S., reported to the War Minerals Relief Commission as follows:

"\* \* \* As I was in the field at that time (1917) for the U. S. G. S., stimulating the production of chrome ore to supply the needs of the country, I strongly encouraged Mr. Hart July 10, 1917, in the presence of his wife to continue his work and develop his producing mine. \* \* \*

"On July 5, 1918, I met Mr. Agard at Red Bluff and his statement concerning our conversation is correct. On July 6, 1918, I visited the Tedoc Mine a second time where I again met Mr. J. H. Hart and strongly urged him to do his utmost in getting chromite to save the country.

"Mr. J. H. Hart and W. A. T. Agard of the Tedoc Company from the beginning have acted in good faith and with all the stimulation my spoken words could supply.

"The Tedoc Company did all it could to produce the chromite needed to win the war."

Claimant therefore respectfully petitions for a rehearing of its said claim upon the following grounds:

1. Because the report by the Government engineer, William H. Harrison, on the properties and operations of claimant, is false.

Because the confidential report by said alleged engineer to the said Commission is willfully and intentionally false.

48 Because these false reports influenced and prejudiced said Commission against claimant.

In connection with the foregoing, claimant states that said engineer, before making said reports, demanded money from W. A. T. Agard in San Francisco on the pretense that it was necessary for claimant to pay "expenses to the mine;" that same was refused and thereupon said engineer became angry.

2. The audit by the Government auditor upon which the Commission relied and acted in not a true and correct audit. (We do not mean that it was made so intentionally.) Said auditor gives to the Commission for a specified period a loss of \$12,855.58 whereas the correct figure for said period is the sum of \$22,101.53.

Claimant has not presented proof in support of the foregoing because of the greater question presented by claimant's contract with California Chrome Company for sale of 4,000 tons of ore, which question involves or covers the greater part of claimant's losses. Claimant, however, is ready, willing and able to present proof in support of specifications Nos. 1 and 2 whenever same is deemed necessary.

3. Because of the award by the Commission was predicated upon the reports of said engineer and said auditor, both of which were and are incorrect.

(a) Said award is contrary to positive and uncontradicted sworn testimony of reputable and unimpeached citizens of the State of California. (See affidavits Agard, Carpy and Brown.)

(b) Because of the false reports and statements claimant was induced to mine chrome ore. When it learned of the deception, it determined to quit and sell, but was induced not to by the Honorable J. S. Diller of the U. S. G. S. Of this, there is and can be no question. The record discloses therefore that because of Government request claimant was induced to continue operations of a magnitude  
49 that was not contemplated by any member of the Company,—  
furthermore it appears without contradiction that plaintiff resumed or continued operations solely because of Dr. Diller's efforts and not otherwise.

(c) Because it is a fact established by the record that had claimant quit operations as contemplated in July, 1917 and sold its holdings, it could and would have realized therefor all sums expended and it would have suffered no loss.

(d) Because claimant's entire loss herein is due solely and entirely to the request by the Government that it continue operations in face of conditions known to the Government at the time it made the request.

(e) Because said award penalizes claimant the amount of its losses because it honestly fulfilled the terms of a contract with California Chrome Company,—a contract fairly executed. (See claimant's petition for rehearing filed November 9, 1920).

4. Because a re-audit of this claim must be had. Every detail of claimant's business is filed with its questionnaire; also copies of its trial balance and statement of profits and losses prepared by a competent certified public accountant of San Francisco, California.

5. Because the proof submitted establishes beyond question and without contradiction that claimant in response of personal request, in good faith expended money in producing or preparing to produce chrome, that it filed its claim in due time, that the proof taken clearly shows it to be based upon action taken in response to such request; therefore claimant is entitled under the Act of November 23, 1921, to be reimbursed such net losses as it may have incurred and is in justice and equity entitled.



Wherefore claimant requests a rehearing that it may establish the losses suffered by it in producing chrome ore at the direct  
50 personal request of the Government.

Dated January 9, 1922.

Respectfully submitted,

TEDOC COMPANY,  
By A. H. JARMAN,  
Its Attorney.

51

EXHIBIT L.

*Memorandum in Review of Claim No. 680, Tedoc Company, San Francisco, Cal., Chrome.*

March 21, 1923.

This is the claim of the Tedoc Company, an association composed of James Brown, Charles Carpy, W. A. T. Agard, and Frank H. Stewart, all of San Francisco, Cal., under section 5 of the Act of March 2 1919, (40 Stat. 1272), as amended by the Act of November 23, 1921, (42 Stat. 322.)

The claim was denied by the Department November 19, 1920, upon recommendation of the former Commission based upon a finding that the company had, prior to the date of stimulation, entered into a certain contract for the sale of its product, which contract served as a definite measure of its intended mining operations, and that its losses were occasioned by its inability to receive the current market price for its ores.

Claimant company has now filed a motion for rehearing under the amendment and the record has been reviewed.

The properties operated are known as the Tedoc group in Tehama County, Cal., 52 miles northwest of Red Bluff, the McArthur-Shawn group 2½ miles from the Tedoc, and the Paskenta mine situated about 40 miles southwest of Red Bluff, Cal.

Stimulation was received by claimant company through visits to the property of J. S. Diller, of the U. S. Geological Survey, on July 10, 1917, and July 5, 1918; also through a visit of Harry Thompson of the Bureau of Mines, in June, 1918. It appears that these officers of the Interior Department strongly urged claimant company to continue its operations and produce as much chrome ore as possible to meet the needs of the Government in the prosecution of the war. Stimulation may, therefore, be conceded as of July 10, 1917.

The mining engineer for the Commission reports that the properties were exhausted of their ore in August, 1918, and that they  
52 were not of commercial importance. However, since large tonnages of chrome ore were produced and sold from each of the properties, this conclusion appears to be unwarranted and commercial importance may be conceded.

The following is the history of operation:

In April, 1917, one C. H. Philpot, a promoter, *can* to San Francisco, and advised Agard and Stewart that he knew of a chrome

property in Tehama County, California, which *would* be purchased and operated successfully at a very low cost. Thereupon Agard and Stewart interested Brown and Carpy, who were to furnish the money for the enterprise. Later Charles E. Bacon, an engineer, was sent to the property and made a favorable report. None of the claimants visited the property until June 22, 1917, after work had begun, and about \$8,000 had been expended. Claimant company asserts that it was deceived by the information furnished it by Bacon and Philpot, especially as to the cost of the road.

The contract of association between Brown, Carpy, Agard and Stewart, is dated June 20, 1917, and provides that Brown and Carpy should furnish \$5,350 for the purchase of the property, and \$3,500 for development. It is further provided that should any additional money be required that Agard and Stewart would bear their proportionate share, and that when these amounts were returned from ore sales Agard and Stewart would be given each a fourth interest in the property. It was estimated that the road would cost about \$3,500. As a matter of fact it finally cost about \$28,000.

On May 10, 1917, Agard secured an order from the California Chrome Company for the delivery of 4,000 tons of chrome ore at 60 cents per unit, to be mined from the Tedoc property. This order was signed and ratified by all of the parties in interest, and took the form of a contract. This contract contained no penalty for failure to operate and deliver, but the California Chrome Company was entitled to whatever ore was produced at the Tedoc mine, up to 4,000 tons during 1917 and 1918, at 60 cents a unit. The Tedoc  
53 property produced 1,407.07 tons of chrome ore, which was delivered to the California Chrome Company under the contract. During the summer of 1918 the market price for chrome ore rose to \$1.50 per unit and over. The California Chrome Company, during the period of operations, made some concessions in price and for cost of transportation favorable to the claimant company, but the contract still remained in force and was the cause of its losses. If it had been privileged to sell its ore in the open market at the current price, it would have made a profit notwithstanding the serious miscalculation that was made as to the cost of the road.

Claimant company asserts that in June, 1917, when Agard visited the property for the first time and found that Philpot and Bacon had grossly misrepresented the probable cost of the road, it was just about ready to sell out and abandon the enterprise, when Mr. Diller first appeared and urged the company to continue. This assertion, however, is not supported by any contemporaneous record evidence.

The contract with the California Chrome Company was a definite declaration made prior to stimulation, as to what the claimant company intended to do, and served as a measure of the scope of the mining operations in which it purposed to engage. The 4,000 tons of chrome ore were sold prior to stipulation at a price which caused the losses. It would not appear, therefore, that such losses can be attributed to the action of the agents of the Government.

It is accordingly recommended that this claim be denied.

IRA E. ROBINSON,  
*Commissioner.*



54

## EXHIBIT M.

Department of the Interior,  
Washington, D. C.

In the Matter of the Claim of Tedoc Company, San Francisco,  
California. Claim No. 680. Chrome.

*Affidavit of C. M. Burleson.*

CITY AND COUNTY OF SAN FRANCISCO,  
*State of California, ss:*

C. M. Burleson, being first duly sworn, deposes and says: That he is seventy years of age, a civil engineer by profession and resides in Alameda County, State of California.

That affiant knows Charles Carpy and W. A. T. Agard and knew James Brown in his lifetime; that these men organized Tedoc Company in 1917 and under such firm name engaged in chrome mining in Tehama County, State of California.

That affiant is not and never was interested in Tedoc Company in any way excepting that in July, 1917, at the request of said company this affiant went to the Tedoc chrome mine, examined the chrome deposits and made a hurried survey and estimated the cost and length of the road, then partially constructed, and reported to said Tedoc Company that said road when completed would be approximately eleven miles in length and would cost approximately Thirty Thousand Dollars.

That the reason for affiant's visit to the property was the fact that one Philpot, then in charge of Tedoc Company operations had represented to said Carpy, Brown and Agard that the said road could be built at a cost of \$3,500 and that it would only be about five miles in length; that affiant was sent to the property to ascertain and report the truth as to the cost and length of the said road, and affiant reported to said Tedoc Company as hereinabove set forth.

55 That affiant had various conversations with Carpy, Brown and Agard during June and July, 1917, and he and all of said gentlemen stated to affiant on more than one occasion that they had been deceived by Philpot as to the length and cost of the road and that they intended to quit operations, dispose of the property and take such loss as might result.

That during the War affiant was in the employ of Western Rock Products Company which company was engaged in producing manganese and chrome; that affiant was in charge of the Beegum chrome properties operated by said Western Rock Products Company situated near the Tedoc chrome mine, and by reason of affiant's connection with said company affiant was familiar with all local operations and conditions.

That this affiant was at Tedoc Company's properties on the occasion of Dr. Diller's first visit to Tedoc Mountain in July, 1917; that affiant met Dr. Diller there and talked with him about the chrome situation and said Diller then and there and in the presence of J. H. Hart and wife stated in substance that the government must have all the chrome ore that we could get out as it was badly needed to win the War,—that Tedoc Company should go ahead, complete the road as quickly as possible and get the ore out.

That to the best of affiant's recollection, said Hart, then in the employ of Tedoc Company, as foreman,—went down to a telephone and communicated with Mr. Agard in Red Bluff and reported what Dr. Diller had said.

That immediately after said conversation this affiant wrote a letter to said Agard and reported what Dr. Diller had said and requested Agard to return to the property and look the situation over again with affiant.

That later this affiant discussed with Carpy, Brown and Agard the visit of Dr. Diller on the property and the statement made  
56 by him to affiant and the said Hart and wife.

That affiant knows of his own knowledge that Carpy, Brown and Agard intended to quit operations of Tedoc Company because of the fraudulent representations made by said Philpot regarding the length and cost of the said road and that they only resumed or continued operations because Dr. Diller had visited the property, approved same and urged them to go ahead as the government needed the ore to win the War.

That at the time of Dr. Diller's first visit to Tedoc Company properties in 1917, there was a considerable tonnage of chrome ore in sight that could be quickly and cheaply mined,—that the only thing lacking to make this ore available for government use was transportation and this problem could only be solved by a completion of the road which Tedoc Company had commenced.

That this affiant and said Hart and wife at the time understood Dr. Diller to mean the Tedoc Company should go ahead and complete the road regardless of cost and get out the ore as the government must have same in order to win the War, and this affiant so reported to said Carpy, Brown and Agard.

C. M. BURLESON.

Subscribed and Sworn to before me this 7th. day of June, 1923.

[SEAL.]

CHARLES R. HOLTON,

*Notary Public in and for the City and County  
of San Francisco, State of California.*



57

## EXHIBIT N.

Department of the Interior,  
Washington, D. C.

In the Matter of the Claim of TEDOC COMPANY, San Francisco, California. Claim #680. Chrome.

*Affidavit of J. H. Hart.*

COUNTY OF MENDOCINO,  
State of California, ss:

J. H. Hart, being first duly sworn, deposes and says: That he is a resident of Mendocino County, State of California, and engaged in mining; that affiant's only interest at any time was that of employee during the years 1917 and 1918 as hereinafter related.

That in the spring of 1917, this affiant accompanied C. H. Philpot and a man by the name of Bacon, who represented himself to be a mining engineer—on examination of the chrome ore deposits on Tedoc Mountain, Tehama County, California—which deposits were subsequently acquired by Charles Carpy, James Brown and W. A. T. Agard who operated under the name of Tedoc Company.

That this deposit of chrome ore was situated some eleven or more miles from a highway and worthless except a road be built in order that same might be hauled out after mining.

That on this examination said Philpot and Bacon looked over the country for the purpose of laying out and building a road to the deposit. After looking over the country, Philpot said to this affiant that a road could be built at a cost of \$3,500; that he could complete a road in thirty days and put the trucks on and later so reported to Carpy, Brown and Agard.

After Tedoc Company was organized, Philpot engaged a man by the name of George Shepard to haul the ore by motor truck and instructed him to report in June, 1917. Said Shepard  
58 brought his trucks to Red Bluff in June, 1917, and came out to the road camp to see how soon he could get to work and said Philpot told him that he would be two or three weeks.

After Tedoc Company was organized affiant was engaged as mining foreman and was instructed to take eight men and go to Tedoc Mountain and open up the deposit so as to have ore on hand for the trucks as soon as the road was completed.

When Philpot came up to start the road he was accompanied by a Mr. Bradd, an engineer residing in Chico, but he had no men to put to work on the road, so affiant took all the miners from the mine and put them at work on the road, and affiant acted as foreman of road construction.

In the latter part of June, 1917, W. A. T. Agard visited the Tedoc mines for the first time and he then learned for the first time the true condition as to the difficulties and cost of completing the road to the mine. Affiant desires to state that at no time could a

road have been built to said ore deposit at a cost of \$3,500 and it was and is impossible to build any such road with a length of approximately five miles, and in this respect affiant states that the only feasible or possible road to said mine was and is the one actually built; that it is more than eleven miles in length and instead of costing \$3,500 as claimed by Philpot, it cost some \$30,000, the exact amount being unknown to affiant.

In the latter part of June, 1917, Mr. Agard made his first visit to the property and for the first time learned the true conditions as to the length and cost of the road. On this trip he was accompanied by Mr. J. R. Van Fleet, the engineer for California Chrome Company, and while Mr. Agard was at the camp with Mr. Van Fleet, he told affiant that they (Carp, Brown and Agard), would have to give it up, meaning that Tedoc Company would quit mining operations.

In the early part of July, 1917, Dr. J. S. Diller came to the road camp of Tedoc Company then located on Beegum Creek and affiant took him up to the mine. An engineer by the name  
59 of Burleson was at the mine and Dr. Diller told affiant in the presence of Mr. Burleson and affiant's wife that he, Diller, wanted Tedoc Company to go on with the work as the government had to have the ore and all they could get, and said Diller told affiant to push the work ahead as fast as he could.

After talking with Dr. Diller, affiant then went to a telephone and talked with Mr. Agard who was at the time in Red Bluff, California, and reported all that Dr. Diller had said.

A little later Mr. J. H. Huffard, of the California Chrome Company, came up to the mine and he urged us to go ahead and finish the road and get out the ore.

Immediately after Dr. Diller's talk, as hereinabove related, Mr. Burleson sent for Mr. Agard and within a short time he returned to the mine, discharged Philpot and engaged affiant as Superintendent of Tedoc Company. Said Agard told affiant at this time that Carpy and Brown had decided to go ahead because the government had urged them to do so. Affiant acted as superintendent of Tedoc Company during 1917 and 1918 and up to the time that said company ceased operations.

At the time Mr. Agard made the contract with California Chrome Company for the sale of the ore, he had never seen the mine. Agard saw the mine for the first time in June, 1917, long after Philpot had started work on the road.

At the time, to-wit, the latter part of June and the first part of July, 1917, and after Mr. Agard's visit to Tedoc Company's mine, Mr. J. R. Van Fleet, Mr. J. H. Huffard, Mr. C. M. Burleson and my wife and myself all knew and expected that Tedoc Company would quit operations because of the false reports made to them by Philpot and Bacon respecting the length and cost of said road.

That when Mr. Agard came to the mine in July, 1917, after having been informed by Dr. Diller's visit and his request that opera-  
60 tions go ahead, he, Agard, told affiant that Carpy and Brown only consented to go ahead and complete the road because of



Dr. Diller's visit to the mine, his approval of the ore bodies and his request that Tedoc Company go ahead and get out the ore as same was needed by the government in order to help win the War.

Affiant states that Mr. J. R. Van Fleet knew at the time that Tedoc Company intended to quit as the situation was fully discussed when he and Mr. Agard visited the mine in June, 1917.

J. H. HART.

Subscribed and Sworn to before me this 1st day of June, 1923.

[SEAL.]

W. A. COOPER,  
*Notary Public in and for the County  
of Mendocino, State of California.*

61

EXHIBIT O.

Department of the Interior,  
Washington, D. C.

In the Matter of the Claim of TEDOC COMPANY, San Francisco, California. Claim No. 680. Chrome.

*Affidavit of J. R. Van Fleet.*

REPUBLIC OF CUBA,  
*Province of Oriente, ss:*

J. R. Van Fleet, being first duly sworn, deposes and says: That he is a citizen of the United States but presently residing at Bueycito, Oriente, Cuba.

That in the year 1917 affiant was in the employ of California Chrome Company as mining engineer.

That annexed hereto is a copy of a letter written to A. H. Jarman, of San Francisco, California, attorney for Tedoc Company, which correctly sets forth affiant's understanding of the facts in relation to the operations of Tedoc Company.

J. R. VAN FLEET.

Subscribed and sworn to before me this 22d day of June, 1923.

[SEAL.]

H. Z. DICKINSON,  
*Consul of the United States of America at Antilla.*

Service No. 1829.

62 Sun Development Company, Bueycito, Oriente, Cuba.

Mr. A. H. Jarman,  
1014 Vermont Ave.,  
Washington, D. C., U. S. A.

May 15, 1923.

MY DEAR JARMAN:

I have your letter of April 30, 1923 in reference to the Tedoc Mining Company's affairs. I remember the Philpot Incident perfectly

and will be very glad to be of any assistance I can to Mr. Agard, as I always have thought very highly of him. All the business between Agard and Stewart or the Tedoc Mining Company and the California Chrome Company was transacted with me on behalf of the Chrome Company up until about the first of August, 1917. After that time I was mostly in the field and Mr. Huffard looked after the ore settlement end of the business.

At the time of signing the contract Mr. Agard told me that they were going ahead and build a road to the property. He said that Philpot had reported on both the deposit and the road and that the road would be only five miles long. I marveled at his good fortune as I had been to the property and did not see how a road, that could be used, could be built to the deposits and be only five miles long. Mr. Agard however assured me that Philpot had found a way.

I heard nothing further about Tedoc Mountain until the latter part of June when Mr. Agard came into my office and told me about the road, and Philpot as it had developed. He said that he and his associates were much disappointed and that Philpot was either grossly incompetent or had misrepresented the true state of affairs. He said that the money appropriated was all gone and that the road instead of being five miles long would be eleven or twelve miles. The object

of Mr. Agard's visit was to get financial assistance to finish the  
63 road. The result was that Mr. Agard and I visited the property. I was not so much interested in the road as I was in the deposits to see how they had opened up. At the time of my first visit the snow was deep and not much could be seen. We went over the three or four miles of road which had been completed and continued over the route to the deposits. I could not blame Mr. Agard for being disappointed as it was difficult to believe how any sane man could make such a road report if he had been over the route necessary to traverse. Also no work had been done on the deposits so under the circumstances I could not give Mr. Agard the help he requested until more development work had been done.

Mr. Agard was very much discouraged and before I left him that night we went over the entire proposition in detail and estimated the amount of money necessary to develop the deposits, finish the road and the time it would take. Under the conditions which presented themselves at that time it did not look like a very good proposition and Mr. Agard said that he was going to advise his associates to drop it. The deposits however had a great deal of merit and warranted development and I intended to see Agard when I returned from Oregon, where I was overdue, in reference to going ahead with the work.

I did not see Agard very soon again but about the middle of July I was with Dr. Diller in Southern Oregon and we talked about Tedoc Mountain and the difficulties they were in. I told him all I knew about it. I do not know whether Dr. Diller had been to the property then or not but he said that by all means they should be encouraged to continue and wanted to know if we would assist with the road provided sufficient ore were put in sight. I told him we



(The California Chrome Company) would finish the road if that were done. He then said that he would see what could be done.

It is evident therefore that the Tedoc Co. were discouraged and ready to quit and from what Agard told me I expected them  
64 to quit. It is also evident from what Dr. Diller told me that the evidence he has already presented that the Tedoc Company were encouraged to proceed after that time by Government Agency.

I did not know that the Tedoc Company sent Mr. Burleson to the property.

I hope that some of the statements made in this letter will be of help to you and if there are any other questions you wish to ask please do not hesitate to write me. I have had many requests to make statements in regard to various Chromite operations but generally I have been unable to do so since statements requested were not true.

With kindest personal regards,

Very truly yours,

J. R. VAN FLEET.

JRvF/w.

65

EXHIBIT P.

Department of the Interior,

Washington, D. C.

In the Matter of the Claim of TEDOC COMPANY, San Francisco, California. Claim #680. Chrome.

STATE OF NEW YORK,

*Borough of Manhattan, ss:*

Jno. B. Huffard, being first duly sworn, deposes and says:

That he resides at Douglaston, Long Island, State of New York; that affiant is the Manager of Purchases for the subsidiary companies of the Union Carbide and Carbon Corporation, and has his offices in the Carbide and Carbon Building, at number thirty East Forty-second Street, New York City.

That in the years 1917 and 1918, affiant was the Vice President and General Manager of California Chrome Company and was familiar with all its business affairs and particularly all the business dealings, between said Company and Tedoc Company.

That affiant has read the affidavit of J. R. Van Fleet, made in Cuba, on June 22, 1923, before the Consul of the United States of America, at Antilla, and the letter of said Van Fleet, dated May 15, 1923, addressed to A. H. Jarman, 1014 Vermont Avenue, Washington, D. C., U. S. A., attached to and make a part of said affidavit,—respecting the affairs of said Tedoc Company in the year 1917 and in relation thereto, affiant states that the facts recited in said letter by said Van Fleet are in accordance with affiant's under-

standing of the facts as they existed in 1917 and as affiant understood them at the time.

66 That affiant has never had any interest in said Tedoc Company and is not presently interested in any way whatever.

JNO. B. HUFFARD.

Subscribed and sworn to before me this 7th day of September, 1923.

[SEAL.]

JOHN A. OVERTON,  
*Notary Public, Kings Co., No. 3.*

Certificate filed in New York Co. No. 10. Term expires March 30, 1924.

67 EXHIBIT Q.

Department of the Interior,  
Washington, D. C.

In re the TEDOC COMPANY. Claim No. 680. War Minerals Relief Act. Chrome.

November 8, 1923.

This is the claim of the Tedoc Company, an association composed of James Brown, Charles Carpy, W. A. T. Agard, and Frank H. Stewart, all of San Francisco, California, under section 5 of the act of March 2, 1919 (40 Stat., 1272), as amended by the act of November 23, 1921 (42 Stat., 322).

The claim was denied by the Department — November 19, 1920, upon recommendation of the former Commission based upon a finding that the company had, prior to the date of stimulation, entered into a certain contract for the sale of its product, which contract served as a definite measure of its intended mining operations, and that its losses were occasioned by its inability to receive the current market price for its ores.

Claimant company has now filed a motion for rehearing under the amendment and the record has been reviewed.

The properties operated are known as the Tedoc group in Tehama County, California, 52 miles northwest of Red Bluff, the McArthur-Shawn group 2½ miles from the Tedoc, and the Paskenta mine situated about 40 miles southwest of Red Bluff, California.

Stimulation was received by claimant company through visits to the property of J. S. Diller of the United States Geological Survey, on July 10, 1917, and July 5, 1918; also through a visit of Harry Thompson of the Bureau of Mines, in June, 1918. It appears that these officers of the Interior Department strongly urged  
68 claimant company to continue its operations and produce as much chrome ore as possible to meet the needs of the Government in the prosecution of the war. Stimulation may, therefore, be conceded as of July 10, 1917.

The mining engineer for the Commission reports that the properties were exhausted of their ore in August, 1918, and that they



were not of commercial importance. However, since large tonnages of chrome ore were produced and sold from each of the properties, this conclusion appears to be unwarranted and commercial importance may be conceded.

The following is the history of the operations:

In April, 1917, one C. H. Philpot, a promoter, came to San Francisco, and advised Agard and Stewart that he knew of a chrome property in Tehama County, California, which could be purchased and operated successfully at a very low cost. Thereupon Agard and Stewart interested Brown and Carpy, who were to furnish the money for the enterprise. Later Charles E. Bacon, an engineer, was sent to the property and made a favorable report estimating that the necessary road would cost about \$3,500. As a matter of fact it finally cost about \$28,000. None of the claimants visited the property until June 22, 1917, after work had begun, and about \$8,000 had been expended. Claimant company asserts that it was deceived by the information furnished it by Bacon and Philpot, especially as to the cost of the road.

The contract of association between Brown, Carpy, and Agard, and Stewart, is dated June 29, 1917, and provides that Brown and Carpy should furnish \$5,350 for the purchase of the property, and \$3,500 for development. It is further provided that should any additional money be required that Agard and Stewart would bear their proportionate share, and that when these amounts were returned from ore sales Agard and Stewart would be given each a fourth interest in the property.

69 On May 10, 1917, Agard secured an order from the California Chrome Company for the delivery of 4,000 tons of chrome ore at 60 cents per unit, to be mined from the Tedoc property. This order was signed and ratified by all of the parties in interest, and took the form of a contract. This contract contained no penalty for failure to operate and deliver, but the California Chrome Company was entitled to whatever ore was produced at the Tedoc mine, up to 4,000 tons during 1917 and 1918, at 60 cents a unit. The Tedoc property produced 1,407.07 tons of chrome ore, which was delivered to the California Chrome Company under contract. During the summer of 1918 the market price for chrome ore rose to \$1.25 per unit and over. The California Chrome Company, during the period of operations, made some concessions in price and for cost of transportation favorable to the claimant company but the contract still remained in force and was the cause of its losses. If it had been privileged to sell its ore in the open market at the current prices it would have made a profit notwithstanding the serious miscalculation that was made as to the cost of the road. In this connection the engineer for the Commission reports as follows:

"The prevailing market price for 45% ore (the claimant's average for 1917) during the fall of 1917 was \$1.00 per unit or \$45.00 per ton. The claimant sold his ore during 1917 for an average price of \$29.30. There was a loss of \$15.70 per ton—the shipments for



1917 totaling 563.21 tons of 45% ore, the loss on account of the contract was accordingly \$8,842.39 for 1917.

During 1918 the sale price was \$1.00 per unit for all ore sold. The average grade was 44%. The average price per ton received from sales of 798.86 tons of 44% ore was \$44.00 per ton. Inasmuch as the market price at the time the 1918 contract was agreed on was \$1.25 per unit for ore of this grade, or \$55.00 per ton, the claimant sustained a loss of \$11.00 per ton in the sale of 798.86 tons of 44% ore.

The total loss in the sale of ore as a result of poor business judgment during 1918 is \$8,787.46. The total loss for 1917 and 1918 is \$17,629.85, which results from the lowest contract the engineer has observed on examination of any claim."

Claimant company asserts that in June, 1917, when Agard visited the property for the first time and found that Philpot and Bacon had grossly misrepresented the probable cost of the road, it was just about ready to sell out and abandon the enterprise, when Dr. Diller first appeared and urged the company to continue.

Claimants have recently furnished the affidavits of J. R. Van Fleet, and engineer of the California Chrome Company, who was familiar with the Tedoc Company's affairs to the effect that in June, 1917, he visited the property and had a conversation with Mr. Agard through whom he learned of the company's difficulties; that Agard was much discouraged and was about to quit; that during the latter part of July, 1917, affiant had a conversation with Dr. Diller in which the difficulties of the Tedoc Company were discussed and that Dr. Diller said they should be encouraged to continue.

Claimants have also furnished the affidavit of J. H. Hart, a- employee of the Tedoc Company in 1917 and 1918, to the effect that when Mr. Agard visited the property for the first time in June, 1917, and saw the situation, especially as to the probable cost of the road, he expressed the prupose of giving up the enterprise.

There has also been furnished the affidavit of C. M. Burleson substantially along the lines of the affidavits of Van Fleet and Hart.

These affidavits have been carefully considered and given due weight. They are found to relate largely to Mr. Agard's disappointment as to the probable cost of the road and to his uncertain state of mind as to whether the operations should be continued. It is also to be remembered in this connection that at this time claimants had in mind an offer from the California Chrome Company to take over the property under a plan that would let them out financially whole.

Notwithstanding this showing the fact remains that there was no break in claimants' operations upon the ground. Work was still in progress at the date of Dr. Diller's visit and apparently continued

on about the same scale thereafter. It is not shown that Dr. Diller knew anything of claimants contract with the California Chrome Company at the time he visited the mine or had any definite information as to the difficulties regarding the road and it is not related that any of the claimants or their employees stated to Dr. Diller that they were about to abandon operations.



No contemporaneous record evidence has been presented in support of the contention that claimants had decided to quit. On the contrary it appears that the copartnership agreement was formally entered into on June 29, 1917, after Mr. Agard had visited the property and before the visit of Dr. Diller. Claimant's final determination in the matter may be judged better by what they did and were doing at the time of Dr. Diller's visit rather than what they said to various parties with whom they were associated.

The contract with the California Chrome Company was a definite declaration made prior to stimulation as to what the claimant company intended to do, and served as a measure of the scope of the mining operations in which it purposed to engage. The 4,000 tons of chrome ore were sold prior to stimulation at a price which caused the losses. It would not appear, therefore, that such losses can be attributed to the action of the agents of the Government.

The motion for rehearing is denied and the claim is rejected.

E. C. FINNEY,  
*First Assistant Secretary.*

72

## EXHIBIT R.

Department of the Interior,  
Washington, D. C.

In the Matter of the Claim of TEDOC COMPANY, San Francisco, Calif.  
Claim No. 680. Chrome. War Minerals Rel-ef Act.

*Petition for Rehearing.*

Claimant respectfully petitions for a rehearing of the decision of November 8, 1923, and in support thereof respectfully avers that:

Said award is contrary to the evidence and conceded facts and therefore contrary to the Acts of Congress under which these proceedings are pending.

The reasons assigned in the decision for denial of an award to claimant are based on surmise and conjecture, which are not true in fact and are contrary to the uncontradicted evidence in the record.

Said decision impairs, in fact destroys, claimant's valid contract fairly entered into by claimant and California Chrome Company and but for which, it is conceded that claimant would be entitled to an award herein.

Said decision is unlawful inasmuch as it denies the right of entering into a lawful and proper contract and keeping same in accordance with its terms.

Said decision destroys claimant's vested rights in and to a valid contract and because thereof arbitrarily denies claimant's vested right under said acts of Congress.

Said decision denys claimant its rights of property guaranteed it under the Constitution of the United States: to-wit: The  
73 right of entering into, keeping, and enforcing a valid contract.

Said decision is erroneous because the uncontradicted evidence establishes that claimant in response to direct personal request of the U. S. Government in good faith expended money in producing chrome ore for war purposes and because of such request suffered the losses claimed.

In event an award is made, a reaudit must be had as the original audit is erroneous in several particulars.

Counsel for claimant has prepared and forwarded to California an affidavit to be executed by W. A. T. Agard covering certain facts in detail which will conclusively establish the erroneous conclusions in said decision.

On December 4, 1923, Counsel was advised by wire that Mr. Agard is confined in the Merritt Hospital, Oakland, California, where he has recently undergone a serious operation and that he will not be able to consider or execute said affidavit for at least two weeks.

Wherefore claimant prays that consideration of this petition be deferred until such affidavit is received; that counsel for claimant be permitted to argue this claim before the Appeals Board, as it is impossible to adequately and properly consider all the ramifications of this claim in a brief.

Respectfully submitted,

A. H. JARMAN,  
*Attorney for Claimant.*

Dated December 6, 1923.

74

## EXHIBIT S.

Department of the Interior,  
Washington, D. C.

In the Matter of the Claim of TEDOC COMPANY, San Francisco, California. Claim No. 680. War Minerals Relief Act. Chrome.

*Affidavit of W. A. T. Agard.*

STATE OF CALIFORNIA,  
*County of Alameda, ss:*

W. A. T. Agard, being first duly sworn, deposes and says:

That when affiant appeared before the Commission in July, 1919, and testified in behalf of claimant, affiant was told by the Commission that only direct requests, either personal or written, from one of the bodies named in the Act, would be considered sufficient as establishing request and demand in order to entitle claimant to an award, and that the Commission did not care to burden the record



with evidence of indirect or published request,—therefore affiant confined his testimony within the limits directed by the Commission.

As appears from the record herein, the first direct personal request to claimant was made by Dr. Diller on July 10, 1917. Had affiant been permitted at the time, he could have established request and demand by publication as is now authorized and sanctioned by the Amendment of November, 1921, and in respect thereto affiant avers:

That the organization of Tedoc Company was not contemplated until after the declaration of war on April 6, 1917; that the enterprise was only then considered by affiant because of a knowledge that chrome was a war essential and affiant believed that same  
75 would be in demand because of war conditions.

That the organization of Tedoc Company was tentatively agreed upon by Carpy, Brown, Stewart and this affiant on *April 13, 1917*;— that this organization was purely tentative and was subject to investigation of the properties submitted, by a competent mining engineer, in order to verify the representations of one Philpot who had submitted same to affiant and his said associates.

That on said date, April 13, 1917, said Tedoc Company made a small deposit on account of the purchase -rice of the Tedoc claims, which were subsequently acquired by the Company,—subject to a favorable report by an engineer to be sent to examine said claims on all matters represented by said Philpot. That said Tedoc Company did not on said date obligate itself to purchase said claims, it merely held an option of purchase which it could thereafter exercise as it saw fit.

That thereafter said Tedoc Company engaged one C. E. Bacon, a supposedly competent and reliable mining engineer, to examine said claims and report thereon to claimant. Said Bacon, at the expense of claimant, went to said claims in Tehama County, California; examined and reported on same, as fully appears in a copy of the report made by said Bacon to claimant on *April 18, 1917*, attached to the claim herein and marked Exhibit "D."

That after receipt of said report and while same was under consideration by said Carpy and Brown and on April 21, 1917, there was published in the Mining and Scientific Press, a mining journal published in San Francisco, California, an editorial in which was quoted a message to the miners issued by the President of the United States, which was as follows:

"To the Miner:

"Let me say that he stands where the farmer does; the work of the world waits on him. If he slackens or fails, armies and statesmen are helpless. He is also enlisted in the great service army.  
WOODROW WILSON."

76 Said message was also published in the Engineering and Mining Journal of that date. That affiant was then engaged in the business of buying and selling war minerals as a broker and had offices at No. 268 Market Street, San Francisco, California, and by reason thereof affiant kept himself fully advised of all conditions



respecting such minerals as far as possible and affiant read the daily market quotations in the public press and all other matters in connection therewith, coming to affiant's attention. That affiant was a subscriber of said Press and reader of such Mining Journal and on the date of issuance, affiant read said message and considered same and then and there directed attention to same to said Carpy and Brown and because thereof urged said Carpy and Brown to go ahead with the enterprise as it was evident that chrome would be in demand because of war conditions and that mining of war minerals was being encouraged by the Government.

That after directing attention to said message, and after consideration of the report made by said Bacon, said Carpy and Brown agreed to go ahead and finance claimant to the extent appearing in the written agreement thereafter executed, dated June 29, 1917, a copy of which is attached to the claim herein and marked Exhibit X-1. This agreement fully and correctly expresses the tentative agreement of April 13, 1917, with modifications, insisted upon by Mr. Asher, attorney for Carpy and Brown, and is exactly the agreement that would have been entered into on final decision to go ahead as hereinafter alleged except as to said modifications,—that the modifications and reason for delay in not promptly executing said agreement will be explained hereinafter.

That on or about *April 22, 1917*, said Carpy, Brown, Stewart and this affiant determined to purchase a part of said claims and operate same, and on *April 23, 1917*, claimant purchased nine of the chrome claims thereafter operated, and thereafter and on *May 31, 1917*, purchased eleven of such claims at a total cost of \$7,294.51.

77 That on May 3, 1917, claimant made its first expenditures for materials and equipment with which to begin operations and on *May 6, 1917*, the first preliminary work was begun and actual road construction was commenced *May 15, 1917*.

That said Philpot was employed as superintendent and was placed in full charge of operations and continued in charge until discharged by affiant in the latter part of July, 1917.

That on *June 22, 1917*, there appeared an article in the San Francisco Examiner, entitled "*Expert Comes to Locate Chromite.*" This article mentioned Dr. Miller of the U. S. C. S. and stated that "*The country urgently needs chromite iron.*"

That this article was published whilst affiant was at the mine on his first visit; that said article was read by G. L. Agard and upon affiant's return from the mine in June 1917, said G. L. Agard directed affiant's attention to said article and affiant then and there read same.

That upon affiant's return, as aforesaid, affiant learned that Dr. Diller was in California, representing the Government, and was urging an increased production of chrome ore for war purposes,—all of which affiant promptly reported to said Carpy and Brown. Said Carpy did not consider such information sufficiently authentic or authoritative to warrant claimant to invest so large a sum of money as affiant had then reported necessary to complete said road, to-wit: \$30,000.



That after reading said article in said Examiner, affiant made effort to get in personal touch with Dr. Diller, but could not locate him, and affiant did not learn of his whereabouts until said Hart told affiant over the telephone that Dr. Diller had been at claimant's property and had examined same and requested that claimant complete the road and get out the ore as the same was needed by the Government for war purposes.

78 That the circumstances and conditions of this phone message to affiant will be explained hereinafter.

Affiant therefore avers that under the Amendment of November, 1921, claimant was stimulated to enter upon the production of chrome by the published message of the President of the United States on *April 21, 1917*, and in this connection affiant avers that the said message greatly assisted affiant in influencing said Carpy and Brown to finance claimant as agreed, and said message greatly encouraged said gentlemen in the belief that the operations contemplated would be for the benefit of their government at war and was the reason why said Carpy and Brown purchased the additional claims on May 31, 1917 at a total cost in excess of that originally intended.

That the published request in said San Francisco Examiner also influenced said Carpy and Brown and caused them to defer immediate decision to quit operations and abandon or sell because of the discovery of the fraud perpetrated by said Philpot and Bacon.

Affiant desires to be plainly understood that said published requests only influenced and controlled affiant and his said associates to the extent indicated in said written agreement and as originally agreed on *April 13, 1917*, except that claimant purchased additional claims on *May 31, 1917*, at a cost in excess of what was originally intended and in no event did affiant or his said associates expect or intend to invest more than the cost of the properties aforesaid and the amounts estimated to complete the road and put the property on an operating basis, to-wit: a maximum possible investment of \$10,000 or \$12,000, and no more; and in this connection affiant states that said Stewart and this affiant were financially unable to undertake any obligation in excess of the investment contemplated as aforesaid,—that neither said Stewart nor his affiant had means with which to undertake any greater investment or obligation and neither had any means of borrowing money for such purpose.

79 Furthermore, that at all times herein mentioned, this affiant was, and still is compelled to work daily to make a living for himself and family and affiant had and has not other source of income and that affiant's daily labors barely return sufficient income for actual necessities.

Affiant avers that in the claim filed, stimulation is claimed because of articles appearing in newspapers, circulars, and Government sources. That affiant endeavors to testify to the facts herein recited as to published stimulation but was each time interrupted by the Commission, as appears for instance, on pages 41 and 42 of affiant's testimony before said Commission.

Affiant asserts therefore that stimulation should be fixed as of *April 21, 1917*, and not *July 10, 1917*.

Therefore affiant states positively that at no time prior to *July 22, 1917*, because of Government request, or otherwise, did claimant contemplate expenditures for road purposes and development in excess of the sum of \$5,000.

That the contract of sale of ore to be produced to California Chrome Company was entered into on *May 10, 1917*, after affiant and his said associates had fully and definitely agreed on the extent and plan of operations and had definitely committed claimant to same.

#### Erroneous Conclusions in Decision on Rehearing.

It is stated in the decision on rehearing that the "contract for the sale of its product served as a definite measure of its intended mining operations."

Affiant avers that such statement is untrue and not based on any evidence in the record and is purely conjecture and surmise.

80 Affiant has stated herein and in another affidavit on file the extent of the mining operations which claimant contemplated and was engaged in when the said contract of sale was made, to wit: on *May 10, 1917*.

That after claimant had thus definitely committed itself as to the plan and scope of operations, affiant approached said California Chrome Company for a contract for the sale of such ore as might be produced from such operations and asked for and endeavored to secure a contract for the sale of 1,000 tons of ore, which tonnage affiant then expected would be produced as a result of the operations contemplated as aforesaid.

*That the open market price of 45% chrome ore on May 10, 1917, was the sum of \$23 per ton and no more;*—that because claimant was thought to have a large tonnage which would be available for delivery in the very near future, affiant was able to obtain and did obtain a price in excess of the open market price, to wit: an increase of \$4 per ton. That at that time, to wit, *May 10, 1917*, affiant and his said associates were elated because of said contract, and under conditions then understood and believed to be true by the said contract, said associates all believed and expected that said contract would result in a good margin of profit to claimant and all concerned sanctioned said contract because of such belief and because all considered it wise and prudent and good business judgment to have an assured market with a reliable concern for claimant's output, at prices in excess of what claimant could then have sold same on the open market.

Affiant is informed and believes and therefore alleges that said contract for the sale of said ore was one of the first, if not the first, contracts made in this country for chrome ore after the Declaration of War. At that time there was no condition of any kind present or indicated which would lead affiant or his said



81 associates to believe that the market price of chrome ore would thereafter increase to such abnormal prices as did obtain—therefore affiant avers that in the light of conditions then existing and as known and understood by affiant and his said associates, said contract was good, sound business judgment, and such as any prudent business man would have entered into under like conditions, and in this connection affiant avers that no losses would have resulted to claimant from its contemplated operations had the reports of said Philpot and Bacon been truthful respecting the length and cost of said road; that had said road been five or six miles in length and had cost claimant not exceeding \$5,000 and had same been constructed easily and quickly, as originally contemplated and believed,—that claimant would have delivered sufficient ore under said contract to have made sufficient profit to recoup all expenditures.

Affiant avers that all ore sold and delivered by claimant was sold at a *profit*. Claimant made a profit in its mining operations as shown in Exhibit "T" attached to the claim filed in the sum of \$13,-443.59, which amount has been duly credited.

Affiant avers that claimant's losses did not result from the contract referred to but that such losses did result from the fact that claimant went ahead and completed said road at a cost of \$28,986.80 instead of \$5,000, as originally estimated and intended, a difference of \$23,-986.80, all because of the direct personal request made by Dr. Diller on July 10, 1917.

Affiant avers that the direct personal request of Dr. Diller on *July 10, 1917*, so influenced claimant that as a result of such request, claimant changed from the plan and scope of operations to which it had definitely committed itself and which all believed up to June 22, 1917, was all that was necessary;—to the enlarged operations of a scope and magnitude not contemplated when operations were commenced.

82 Affiant avers that the completion of this long, expensive road at Government request delayed claimant some four months in making delivery of ore beyond what was originally estimated and reported to claimant by said Philpot and Bacon. That had said road been completed and ready for hauling in June, 1917, claimant could have and would have mined and delivered many hundreds of tons of ore that still remain in and on the properties operated. That claimant's properties are located in the high mountains and cannot be operated during the winter months.

Affiant avers that said road is a long, hard haul and expensive, whereas the road originally reported, and over which claimant expected to haul the ore contracted for, was a supposedly easy grade and hauling charges comparatively inexpensive. Affiant avers therefore that said contract neither measured the extent of claimant's intended operations nor caused the losses which claimant suffered but on the contrary all of affiant's losses were suffered and only suffered because of the following conditions:

(1) The very large cost to complete said road at Government request, over and above what was originally estimated.



(2) Delay in producing and delivering because of extra time required to complete said road.

(3) Extra cost for haulage, scarcity and inefficiency of labor and higher wages.

Affiant avers that all of these conditions were assumed by claimant solely and only because of Dr. Diller's request, and not otherwise; that none of these conditions were contemplated, intended, or expected on May 10, 1917, that therefore the said contract did not and could not measure the extent of claimant's operations in respect of the losses suffered and claimed. As already stated, mining operations were conducted at a profit;—the only difficulty was that  
83 claimant was not permitted because of the failure of the market to operate for a sufficient length of time to make sufficient profit to amortize its investment.

In said decision it is stated that claimant suffered a loss on its operations because of said contract; that

“if it had been privileged to sell its ore in the open market at the current price, it would have made a profit notwithstanding the serious miscalculations that was made as to the cost of the road.”

The statement quoted is true, however, no miscalculation was made by claimant. The only miscalculation was that fraudulently made by said Philpot and Bacon.

Had claimant breached its contract and sold its ore at prices prevailing at time of delivery, it would have recouped its entire investment and suffered no losses. Affiant avers that both Carpy and Brown were men of sufficient means to have responded to any suit for damages for breach of said contract. That had claimant breached its contract with said California Chrome Company there would have been no defense which claimant could have made, and said California Chrome Company could and would have obtained and enforced a judgment against claimant.

Affiant avers that no member of said claimant ever contemplated such action nor would they or any of them do so under any circumstances. Affiant desires the Secretary to understand that this claimant kept and performed all its agreements; that the said contract of May 10, 1917, was freely and fairly entered into, that there was no fraud, duress or misrepresentation of any kind in connection therewith and that no reason existed which warranted claimant in breaching same and had it done so, such action would have been in bad faith and contrary to the laws of the State of California where said contract was executed.

Affiant has read the report made by the Government engineer, a part of which is quoted on page 5 of said decision, and in respect thereof affiant states that said report is false and untrue in many particulars and was and is not a fair and impartial report. That said report was made by said engineer after he had demanded money of claimant for the alleged purpose of obtaining expenses with which



to go to claimant's property to make said examination for the Government, and upon claimant's refusal to give said engineer any money for said alleged purpose, said engineer became peeved and indicated in no uncertain manner his displeasure.

That immediately said demand was made and prior to any examination by said engineer, this affiant told claimant's counsel of said demand and that because thereof claimant feared that said engineer would make an unfavorable report and claimant requested its said counsel to secure examination by another Government engineer. Affiant is informed and believes and therefore alleges that claimant's said counsel immediately communicated with Mr. E. L. Fleming, then auditor and in charge of work in California, and told said Fleming of the facts just recited and requested of said Fleming that said engineer be not permitted to make said examination and that an unbiased and unprejudiced engineer be sent to examine claimant's properties;—that said Fleming told claimant's counsel that another engineer would be sent and this affiant supposed that such request had been complied with until advised to the contrary a year or more later.

Affiant avers that the report of such an engineer is unworthy of belief in any particular and is of no value, and that it is not just and equitable to claimant to use or rely on same for any purpose.

85      Affiant avers that the statement made by said engineer, to-wit: "Loss in sale of the ore as a result of poor business judgment" is the result of ignorance and prejudice and is not based on facts and that an award in this claim should be reached upon verified facts and not upon the unverified assumptions of such a person.

As to Claimant's Charge in the Scope of Operations to Which it was Committed at the Time of Dr. Diller's Visit on July 10, 1917.

As has been stated herein, said Philpot was in full and complete charge of all mine and road work, and so remained until the latter part of July, 1917. That after the middle of June, 1917, *said Philpot reported that he had expended all the money* which had been furnished for road construction, that the road was not completed and that more money was needed.

That said Philpot had previously reported to claimant that said road would be completed and production begun by the middle of June, 1917. Therefore, affiant conferred with Carpy and Brown and reported conditions as submitted by said Philpot; thereupon said Carpy and Brown directed affiant to go — the property, investigate conditions and report to them. Affiant went to the mine with J. R. Van Fleet and reach there on *June 22, 1917*, and found conditions as recited in another affidavit previously filed herein. That affiant and said Van Fleet estimated roughly that it would cost claimant approximately \$30,000 to complete said road in order to get out the ore. Affiant on this visit for the first time learned that the reports made by said Philpot and Bacon, as aforesaid, as to the length, character and cost of said road, were false.



86 That on this trip affiant told said Van Fleet that we (meaning claimant) would have to quit and sell, as affiant could not see how or where the money necessary to complete the road was coming from, and said Van Fleet then indicated that his Company (California Chrome Company) would take over claimant's property and reimburse claimant for all moneys thus far expended and allow a fair profit, and said Van Fleet pressed affiant for a firm offer. Affiant avers that he had no authority to make or accept any such offer, and that affiant had no right or authority to order said Philpot to discontinue operations or to discharge him. That the only authority possessed by affiant was to investigate and report conditions to his said associates, therefore affiant did nothing more.

After investigating fully, affiant returned to San Francisco and on or about *June 25, 1917*, reported conditions to affiant's associates and said Carpy and Brown then and there announced and declared that they would put up no more money, that they desired to sell out for such sum as might be obtained and take any loss resulting; that in no event and under no circumstances would they complete the road at an approximate cost of \$30,000. Said Carpy and Brown then instructed affiant to endeavor to sell claimant's properties, dispose of all equipment and wind up its affairs.

That after affiant's return to San Francisco, as aforesaid, and after the decision to quit and sell as aforesaid, affiant's attention was directed to the newspaper article appearing in the San Francisco Examiner, above referred to; that affiant then read same and directed attention of said Carpy and Brown to same, and because thereof urged said Carpy and Brown to continue operations and build said road. Affiant pointed out to them that the Government was urging chrome production for war purposes, and that Dr. Diller was in California for that purpose. Said Carpy and Brown then directed

87 affiant to get in touch with Dr. Diller and find out the truth as to Government need and whether or not it was such as required the development of claimant's property at so great a cost. Affiant endeavored to do so, but could not locate Dr. Diller. Not hearing from Dr. Diller, said Carpy and Brown again announced their determination to quit and sell, and accordingly again directed affiant to go to the mine, discharge Philpot, arrange for the sale of all equipment, and sell claimant's property for the best price obtainable.

As a result of affiant's report of his first visit to the mine and because of conditions recited and because affiant was not a mining engineer, said Carpy and Brown decided to send an engineer to the property in order to be certain of conditions before taking final action, and accordingly said Burleson was requested to make a report on the ore bodies and more particularly to investigate and report on the road, and to advise said Carpy and Brown as to the probable cost and time for completion and the value of the property.

Later affiant again started for the mine to carry out said instructions. That to reach said mine, it is necessary to travel from Red Bluff by automobile. That affiant had previously advised J. H. Hart, then mine foreman, that he was coming to the mine and whilst at Red Bluff and on or about July 10th or 11th, said Hart com-



municated with affiant by telephone and told affiant of the visit of Dr. Diller to claimant's property, that Dr. Diller approved of everything and had urged going ahead with the road work and getting out the ore as the Government must have same for munitions.

That on receipt of this information, affiant concluded to return to San Francisco and report these facts to Carpy and Brown and if possible, persuade them to continue operations as affiant felt that it would be a good business. Affiant returned to San Francisco and

88 reported said facts to Carpy and Brown and urged said gentlemen to furnish the finances to go on with the work. That

later C. M. Burleson, an engineer who was at the mine with Dr. Diller on July 10, 1917, confirmed the statements made to affiant as aforesaid.

That said Burleson went to said mine, made the examination requested, and reported that the total cost of the road would approximate \$30,000 and that in his opinion there was ore in sight and probable ore to justify said Carpy and Brown going ahead.

Affiant does not remember the exact date that said Burleson made said examination but affiant does know that it was some time between July 10th and July 20, 1917. That upon receipt of the report of said Burleson and his statements verifying the request of Dr. Diller, as aforesaid, affiant urged upon said Carpy and Brown that it was a duty to their Government to advance the funds to complete the road and get out the ore.

That the agreement of *June 29, 1917*, provided the extent of claimant's operations and provided the limit as to amount of money to be furnished by said Carpy and Brown; that after such limit was reached and should any more money be required, that same would be supplied equally by Carpy, Brown, Stewart and this affiant; that any additional amounts was only intended to cover unforeseen and reasonable expenditures that might be necessary beyond the estimates made, as — matter of a few thousand dollars and no more, and that it was never intended or expected at any time that more than \$5,000 would be required for road purposes.

In respect to the original agreement of April 13, 1917, affiant avers that the said agreement was to the following effect:

Carpy and Brown were to finance the enterprise to the extent of \$8,750, provided investigations of the properties submitted proved satisfactory; that said Carpy and Brown were to be reimbursed their  
89 said investment out of the first profits accruing and thereafter the properties and profits were to be owned and divided as follows:  $\frac{1}{4}$  to Carpy:  $\frac{1}{4}$  to Brown and  $\frac{1}{2}$  to Agard and Stewart.

After it was determined to go ahead as herein recited, the above facts were given to Mr. H. K. Asher, 110 Sutter Street, San Francisco, California, the attorney for Carpy and Brown and he was requested to draft same into a formal agreement. Mr. Asher was Mr. Carpy's personal attorney; he opposed the enterprise and advised both Carpy and Brown not to go into it and did all in his power to discourage them. He delayed drafting the agreement and when he finally submitted a proposed draft of the agreement it contained con-



ditions that were not acceptable to affiant and said Stewart and affiant refused to sign. This necessitated conferences with Carpy and Brown and because of the fact that Mr. Carpy resides in St. Helena, California, the approval and execution of the written agreement was for various reasons deferred from time to time and not executed promptly as it should have been.

No satisfactory agreement had been drafted or agreed upon at the time of affiant's first visit to the mine in June, 1917. On affiant's return and after reporting conditions, Mr. Asher insisted on the execution of the agreement of June 29, 1917, as prepared by him.

At this time affiant knew that unless Carpy and Brown would further finance the enterprise that operations must cease and affiant and said Stewart yielded and signed the agreement of June 29, 1917, even though it varied slightly from the original understanding. At the time of the execution of said agreement, affiant knew that Dr. Diller was in California encouraging chrome production; affiant believed that there was enough chrome ore in the properties to warrant claimant going ahead. Therefore affiant urged going ahead and yielded in all matters to said Carpy and Brown as affiant did not wish to quit—though affiant and all his said associates then knew that  
90      neither affiant nor said Stewart had the means to bear their share of the cost to complete said road.

Affiant and said Stewart signed said agreement because Mr. Asher insisted upon it and under existing conditions affiant had no other alternative.

When, however, it was ascertained that approximately \$30,000 additional would be required, said Carpy and Brown then stated that because of Dr. Diller's request that they would put up their respective shares provided said affiant and Stewart would put up theirs. As already stated, neither said Stewart or affiant were able to put up so large an amount, that neither had any means to do so and were unable to borrow same, and therefore it was necessary to modify said agreement in this respect, putting the entire burden of additional financing on said Carpy and Brown.

Affiant avers that after such argument and persuasion on the part of this affiant, said Carpy and Brown finally yielded and agreed to furnish the necessary capital so as to enable claimant to go ahead; that this conclusion was reached by them in San Francisco on or about *July 21, 1917*, and on *July 23, 1917*, this affiant again went to the mine and at the direction of said Carpy and Brown, discharged said Philpot and made Hart superintendent of operations, and directed said Hart to hire all men available, rush the completion of the road and get out the ore.

Respecting said original agreement of *June 29, 1917* and the obligations therein requiring said Stewart and this affiant to advance their share of any additional sums that might be required because of unforeseen conditions, this affiant stated that on that date and at all times thereafter, that said Stewart and this affiant were not able, combined, to furnish the claimant the total sum of \$1,500; that all concerned believed that in any event not more than \$2,000 or \$3,000



91 would be required, and therefore said Stewart and affiant obligated themselves as in said agreement provided, that had either said Stewart or this affiant believed or known that any such additional sum as was required, would be required, that claimant would never have been organized and this affiant positively would not have entered into any such agreement as to have done so, would have been fraudulent and a wrong to said Carpy and Brown. That said Stewart and this affiant invested in claimant's operations a total sum of \$1,298.17, as fully appears in Exhibit "Y-3" attached to the claim filed; that said sum was and is all that said Stewart and this affiant had or could raise for claimant's operations no matter what the conditions were,—all the balance of capital necessary was furnished by said Carpy and Brown.

Therefore affiant repeats that said Stewart and this affiant only committed themselves to operations which at the time all believed would be within the means of each; that the contract with the California Chrome Company for 4,000 tons of ore had nothing to do and in no wise influenced this affiant or his said associates in the scope of intended operations; that claimant had committed itself to said intended operations long prior to the making of said agreement.

Affiant avers that he is now past 70 years of age that in his entire business career he has never knowingly or intentionally made any engagement which he did not honestly believe and feel that he could fulfill; that had affiant on *April 13, 1917*, or at any other time committed himself to bear one-fourth of the additional amounts required to complete said road, that affiant would have been guilty of making false and fraudulent representations to his friends, Carpy and Brown, in order to induce them to enter into this organization, as at not time did this affiant have the financial means of complying with any such demand.

The notice of decision stated on page 7:

92 "Notwithstanding this showing the fact remains that there was no break in claimants operations upon the ground. Work was still in progress at the date of Dr. Diller's visit and apparently continued on or about the same scale thereafter."

In reference to this statement, affiant admits that from the time of his visit on *June 22, 1917*, to his second visit *July 23, 1917*, that there was no break in the operations conducted under the supervision of said Philpot,—but affiant avers that claimant would have stopped operations and discharged said Philpot in the latter part of *June, 1917*, and sold out but for the facts and circumstances hereinabove recited.

That between *June 22, 1917*, and *July 11, 1917*, said Carpy and Brown twice concluded and determined to quit, and because thereof claimant would have been compelled to quit. That said determinations to quit were each time put off because of Government request, the first time because of the article in said *San Francisco Examiner*, and the second time because of Dr. Diller's request. Affiant avers therefore that but for these requests that claimant would have quit operations and sold its property at the time.

That at the time affiant did not encourage shutting down operations even though Carpy and Brown decided to quit and sell because affiant believed that in the event claimant quit—that it would be easier for affiant to sell a going concern than a dead one but whether these reasons influenced continued operations affiant does not now remember but affiant does remember positively that immediate sale was stopped because of Government stimulation

Affiant avers that had claimant then quit and sold out in July, 1917, that it could and would have done so *at a profit*, and claimant would have suffered *no loss* as claimant's property was then in demand and claimant had many opportunities to sell.

93 Affiant states that it is not true that claimant "apparently continued on about the same scale thereafter."

That after affiant's second visit on *July 23, 1917* claimant hired more men, in fact claimant hired every available man that could be induced to go to work either on the road or in the mine. That claimant thereafter rushed all work within its power to a maximum degree and that nothing was left undone within reason, to complete said road as quickly as possible, and affiant avers that said road was sufficiently completed in October, 1917 to permit hauling, and that on October 29, 1917, claimant shipped its first car of chrome ore.

That after determination to go ahead, as aforesaid, claimant took over and operated a chrome property under lease from MacArthur and Shown, and also took over and operated the Paskenta claims; the first expenditures in connection with the Paskenta claims was in September, 1917, and the first expenditures under the MacArthur and Shawn lease were incurred in February, 1918.

Affiant avers that these operations resulted because of the specific personal request of Dr. Diller and were engaged in by claimant to aid in chrome production for our Government at war.

Comment is made on the fact that "no contemporaneous record evidence has been presented in support of the contention that claimant had decided to quit."

There was no such record made at the time and therefore claimant is unable to present any such evidence. All dealings and negotiations between affiant and his said associates were more or less informal, all parties were friendly and trusted each other, and in all dealings and in all relations between themselves, there was no friction or discord or misunderstanding of any kind, consequently there was no need at the time for formal record in relation to such a matter. That at the time neither affiant nor any of his said asso-

94 ciates had any idea of any such proceeding as this, nor did affiant believe that record evidence of such a matter was or would be necessary for any purpose.



## Contract Sale of 4,000 Tons.

The notice of decision concludes:

"The contract of May 10, 1917, definitely decides as to what claimant intended to do and serves as a measure of the scope of the mining operations in which it purposed to engage."

This statement is not true:

First, because claimant had fully, definitely and clearly committed itself to a plan and scope of operations (which did not contemplate or include an 11-mile road, costing approximately \$30,000) prior to the making of said contract with said California Chrome Company.

Second, because claimant's losses resulted principally from the great cost of building said road after direct Government request.

Third, that said contract did not in the slightest degree influence claimant's mining operations, that no loss was suffered by claimant because of mining operations, on the contrary a profit was made and same has been duly credited.

Lastly, said contract of sale was not a firm offer to deliver said 4,000 tons in any event; it merely obligated claimant to deliver all ore mined up to that amount; in event claimant produced same from its property.

Affiant avers that claimant could have quit operations at any time without penalty because of said contract, therefore affiant avers that said contract did not commit claimant to all mining operations and road building that would guarantee delivery of 4,000 tons of ore and that at no time did claimant or said company consider claimant obligated to do so.

95 In connection with this contract, affiant states that after claimant had definitely determined to go ahead and after it had made its first expenditures and after beginning actual operations, affiant thought it advisable and good business judgment to secure an assured market for the ore produced, accordingly, affiant approached said California Chrome Company and sought a contract for the sale of 1,000 tons of chrome ore. That as a result of negotiations, said company agreed to take either 1,000 tons or 2,000 tons of chrome ore to be purchased from Tedoc Mountain at 60¢ per unit, but not obligating claimant to deliver in any event. That 1,000 tons was all that affiant endeavored to sell or expected to sell and only then on the terms and conditions expressed in said contract. That when said company wrote up the said contract it inserted 4,000 tons instead of 1,000 or 2,000 tons; that when affiant inquired as to the change, Mr. Van Fleet replied that he understood that the properties owned by claimant would likely produce a much larger tonnage and that his company would agree to take the entire output up to 4,000 tons and that if claimant would agree to sell up to that amount, that his company would take same, and that such a contract was satisfactory to Carpy and Brown.

That the market price of 45% ore on May 10, 1917 was \$23.00 per ton; that because of the large tonnage then supposed to be available and the quick delivery expected, said company agreed to pay claimant \$27.00 per ton for 45% ore, an increase of \$4.00 per ton over the current market price. That affiant and all his said associates then believed that said offer was more than fair and in the light of conditions as then understood, that the price would result in a good profit on the deal, and the said contract for 4,000 tons was insisted upon by Carpy and Brown.

Affiant avers that such a contract was at the time good, sound business judgment and because affiant so believed, agreed  
96 with his said associates to execute same, and affiant again asserts that said contract when executed was fair, reasonable and just and in no sense resulted from the exercise of bad judgment.

Said decision states:

"The 4,000 tons of chrome ore were sold \* \* \* at a price which cause the losses" and that claimant's "losses were occasioned by its inability to receive the current market price for its ores."

In respect to this contention, affiant states that on *July 10, 1917*, when Dr. Diller requested completion of the road and continued operations, the market price of 45% chrome ore was less than 60¢ per unit, that this fact was known to Dr. Diller at the time, and so understanding, Dr. Diller made the request aforesaid.

That on May 10, 1917, affiant and his said associates did not expect or believe that the price of chrome would thereafter increase to such abnormal prices as did obtain; that while it is true as stated, that had claimant received the market price for chrome ore obtainable at time of delivery, instead of said contract price, that claimant would have greatly increased its profits and would have suffered no losses;—but to have done so claimant would have had to breach its contract and subject itself to a suit for damages, which damages would have amounted to a far greater sum than the losses suffered, and *claimant* herein. However, affiant and his said associates did not regard the breaking of said contract as honorable or legal and because thereof, claimant fulfilled its agreement, although at the time it was realized by all that because of increased prices, claimant was not receiving what it might have received but for said contract, nevertheless and without any knowledge or expectation of reimbursement for losses suffered, claimant kept its agreement  
and suffered the losses claimed herein.

97 And further affiant sayeth not.

W. A. T. AGARD.

Sworn and subscribed to before me this 4th day of January, A. D. 1924.

[SEAL.]

JOHN M. VAN EVERY,  
*Notary Public in and for the County  
of Alameda, State of California.*

My commission expires June 16, 1924.



98

## EXHIBIT T.

Department of the Interior.

Washington, D. C.

In the Matter of the Claim of TEDOC COMPANY, San Francisco, California. Claim No. 680. War Minerals Relief Act. Chrome.

*Affidavit of Charles Carpy.*

STATE OF CALIFORNIA,

*County of Alameda, ss:*

Charles Carpy, being first duly sworn, deposes and says:

That he is one of the claimants herein; that affiant has read the foregoing affidavit of W. A. T. Agard; that said affidavit states the facts respecting the operations of Tedoc Company and the situations and conditions confronting claimant in April, May, June and July, 1917.

That the facts recited are as affiant and the late James Brown understood them at the time and because of which said Agard persuaded this affiant and said Brown to finance claimant to an extent not contemplated or expected when operations began; that such additional financing by affiant and said Brown was due solely and only to the efforts of Dr. Diller, and but for which claimant would have quit operations and sold its properties in July, 1917.

CHARLES CARPY.

Subscribed and sworn to before me this 4th day of January, 1924.

[SEAL.]

JOHN M. VAN EVERY,  
*Notary Public in and for the County  
of Alameda, State of California.*

My commission expires June 16, 1924.

99

## EXHIBIT U.

Department of the Interior.

Washington.

The TEDOC COMPANY. Claim No. 680. War Minerals Relief Act. Chrome.

On Rehearing.

March 29, 1924.

This claim has twice been considered by the Department and twice rejected. It was recommended for disallowance in the first instance by the War Minerals Relief Commission and rejected by

the Department under date of November 19, 1920, on the ground that claimant had, prior to July 10, 1917, the conceded date of stimulation or encouragement, entered into a contract with the California Chrome Company for the sale of its product, which contract served as a definite measure of its intended mining operations; that all expenditures after Dr. Diller's visit to the property were necessary to the carrying out of the company's agreement with the California Chrome Company, and that the losses sustained were not the result of Government influence. In the language of the Commission, at the time of Dr. Diller's visit to the property:

\* \* \* the claimants were already fully committed, by their contract with the California Chrome Company, to a plan of development and operation, which could not have been changed, except by the permission of the California Chrome Company.

They were obliged by their sales contract to sell their output at a price far below the prevailing market prices at the time their product was shipped.

Mr. Diller did not, and could not, have changed this contract and the loss of the claimants was not increased by reason of his visit.

100 On petition, the claim was reconsidered under the amendatory act of November 23, 1921 (42 Stat., 322). It was then contended in effect that claimant's losses did not grow out of its contract with the California Chrome Company; that there was no covenant or agreement compelling claimant to deliver any ore, nor was there any penalty to be suffered in the event claimant did not deliver; that said losses were the result of the greatly increased cost of the undertaking over that previously contemplated, especially the cost of building about 10 miles of road connecting the mine with an established highway; that whereas the cost of the road had been estimated at \$3,500, the actual cost when completed was about \$30,000; that at the inception of the venture in the spring of 1917, claimant had not seen the property and did not visit it until about June 22, 1917; that it had a superintendent and an engineer on the ground in active supervision of the work and assumed that these employees were competent and trustworthy; that upon visiting the property in June, 1917, it found for the first time that the facts regarding the length of the road and its probable cost had been grossly misrepresented; that only about three miles of the road had then been constructed although several thousand dollars had been expended and that the difficulties of the undertaking and the cost of putting it through had been greatly underestimated; that it was disappointed and disheartened and contemplated selling the property or abandoning the venture but being encouraged and stimulated by Mr. Diller's visit to the mine on July 10, 1917, decided to continue and carry it through to completion. Claimant insisted that it acted in response to direct personal request of the Government and because thereof sustained losses amounting to \$37,326.03 for which it should be compensated.

The Department held, however, in effect, under date of November



8, 1923, that nothing in the record warranted a conclusion different from that previously announced and the claim was again rejected.

Rehearing is asked and Mr. W. A. T. Agard, the moving  
101 spirit in the enterprise has furnished an extended affidavit relating the history of the operation in detail. Counsel for claimant has also been heard orally in the matter and strenuously insists that claimant is entitled to an award. It is now contended, never having previously been suggested, that stimulation should be granted through published solicitations and appeals effective April 21, 1917, antedating the beginning of operations on the ground and likewise antedating the sales contract with the California Chrome Company executed May 10, 1917. It is asserted furthermore that in event it is held that the claim is within the act a reaudit must be had as the original audit of the expenditures is erroneous in several particulars with respect to which a definite statement would be submitted at the proper time.

The contention with respect to an earlier date of stimulation is much belated and is obviously an afterthought. In the opinion of the Department it is wholly without merit. It may be conceded that Mr. Agard did, as alleged, read the articles referred to on the dates mentioned, the earliest of which is set down as April 21, 1917. But, It can not be conceded that these articles caused or produced any change *change* in claimant's plans or purposes or caused or occasioned and expenditures that would not otherwise have been made, for it is perfectly clear from the record that the venture was conceived prior to that time and an option taken on the Tedoc property as early as April 13, 1917, at which time the Tedoc Company was formed. This was before any campaign for increased production had been inaugurated. In no event therefore, will claimant be permitted to go back of July 10, 1917, to recover any expenditures.

The history of the operation has been given in the prior decisions but the essential facts will be set forth anew. Early in April, 1917, one Philpot, a promoter, came to San Francisco, and directed Mr.

Agard's attention to certain chrome properties in Tehama  
102 County stating that a large tonnage of high grade chrome could be easily and cheaply mined there and suggested that Agard and his partner Stewart secure the necessary capital, take over the property and operate same. The property at that time was owned by Jack Hart and associates. He, Philpot, represented that the greatest expense connected with the development of the property would be the construction of a road approximately five miles in length and stated that this would probably cost \$3,500 and in no event more the \$5,000. Agard was favorably impressed with the proposition and believed that it would return a substantial profit. Thereupon he and Stewart interested Brown and Carvy who were to furnish the money for the enterprise, a voluntary association was formed on April 13, 1917, called the Tedoc Company, and on that day an option was taken on the property. An engineer, one Charles T. Bacon, was immediately sent to the property, and under date of April 18, 1917, made a favorable report substantially confirming



Philpot's statements. The property was purchased on or about April 22, 1917, Philpot was engaged as superintendent, and road work was started and development of the mine was commenced. On May 10, 1917, claimant entered into what was supposed to be a very favorable contract with the California Chrome Company whereby it agreed to ship 4,000 tons of chrome ore during 1917, at a price of 60 cents per unit on ore averaging 40 per cent or better, to be produced from the Tedoc Mine. This it appears, was the highest market price for chrome at that time and for some time thereafter. In case claimant failed to ship the 4,000 tons during 1917, the California Chrome Company reserved the right to purchase all of the unfulfilled tonnage at the same price during the year 1918. It was further agreed that any assignment or transfer of the property should be subject to the conditions and stipulations of the aforesaid contract, and that the order was to be considered filled in event the said mine became exhausted before 4,000 tons had been produced.

103 As previously stated no member of Tedoc Company had seen the property until June 22, 1917, when Agard made his first visit and learned that the representations made by Philpot and Bacon were misleading and not in accordance with the facts. On this visit to the property Mr. Agard was accompanied by J. R. Van Fleet who was in the employ of the California Chrome Company. Van Fleet represented the California Chrome Company in negotiating the contract of May 10, 1917, for the output of the mine. In this connection Mr. Van Fleet says:

At the time of signing the contract Mr. Agard told me that they were going ahead and build a road to the property. He said that Philpot had reported on both the deposit and the road and that the road would be only five miles long. I marveled at his good fortune as I had been to the property and did not see how a road that could be used could be built to the deposits and be only five miles long. Mr. Agard however, assured me that Philpot had found a way.

I heard nothing further about Tedoc Mountain until the latter part of June when Mr. Agard came into my office and told me about the road, and Philpot as it had developed. He said that he and his associates were much disappointed and that Philpot was either grossly incompetent or had misrepresented the true state of affairs. He said that the money appropriated was all gone and that the road instead of being five miles long would be eleven or twelve miles. The object of Mr. Agard's visit was to get financial assistance to finish the road. The result was that Mr. Agard and I visited the property. I was not so much interested in the road as I was in the deposits to see how they opened up. At the time of my first visit the snow was deep and not much could be seen. We went over the three or four miles of road which had been completed and continued over the route to the deposits. I could not blame Mr. Agard for being disappointed as it was difficult to believe how any sane man could make such a road report if he had been over the route necessary to traverse. Also no work had been done on the deposits so under the circum-



stances I could not give Mr. Agard the help he requested until more development work had been done.

Mr. Agard was very much discouraged and before I left him that night we went over the entire proposition in detail and estimated the amount of money necessary to develop the deposits, finish the road and the time it would take. Under the conditions which presented themselves at that time it did not look like a very good proposition and Mr. Agard said that he was going to advise his associates to drop it. The deposits however had a great deal of merit and warranted development and I intended to see Agard when I returned from Oregon where I was overdue, in reference to going ahead with the work.

Mr. J. S. Diller of the United States Geological Survey visited the Tedoc Mine on July 10, 1917, and went over the property in company with Jack Hart, the mine foreman. He, Diller, had no knowledge of the contract held by the California Chrome Company

104 for the output of the mine, but states that he encouraged Mr. Hart to continue his work and develop the mine. In this connection Mr. Agard testified at the hearing in July 19, 1919, as follows:

Mr. Agard: In July of 1917. That was before the road was built, when there was -bout 3 miles of the road built—no, when there was -bout 5 miles of the road built, I guess it was. And I had been up there just previously with the California Chrome Company's man, Van Fleet, and Van Fleet looked over the property and he asked me to take—if I would not consider and take a fair profit over the cost, our present outlay. I was kicking about the length of the road and the reports and one thing and another, and I wanted to—he asked me if I would not do it. I didn't say much at the time, but I had it under consideration, thinking over it. And then Mr. Diller came along and went over the property with Jack Hart in July and spoke very highly of the property and insisted on going ahead and pushing it ahead for the government's business; must have the chrome, was absolutely necessary, and so on. And so on that report—I met Mr. Diller a little while afterwards (this however was in July 1918) and he reported the whole thing to me, insisted that we push the whole thing ahead, and we concluded it would be a paying proposition, and the government was going to take it over, and all that, and we stayed with the proposition and didn't sell it. \* \* \*

Mr. Agard: We would have made money if we had not been requested to go ahead on it. Now, that is sure, because we would have sold out. When we had spent so much money we would have simply said, "All right, we will take a profit on our investment," and we would have made money, had we not—

Commissioner Moore: Wherein did you make any difference in the production of chrome by not selling out? Whomsoever you sold it to would have mined just as much chrome, would he not?

Mr. Agard: I don't know anything about that. He could have done as he liked. I know we would have been clean of the property at that time and would have made a profit.

Commissioner Moore: Did Mr. Diller advise you not to sell out, or request you not to?

Mr. Agard: No sir, in reality, he didn't know anything about it. That was kept under the hat.

\* \* \* \* \*

Mr. Jarman: Mr. Agard, when you first went to the property in 1917 and found out the conditions, I understood you to say that you then saw that the cost of the construction of the road would amount to—would far exceed the estimate furnished you by Mr. Philpot?

Mr. Agard: That is right.

Mr. Jarman: Isn't it a fact that at that time you saw and knew that the cost of the road would be so great that it would take up more capital than you and your associates had planned to invest in the property?

105 Mr. Agard: That is right.

Mr. Jarman: And I also understood you to say that after determining that fact you determined practically either to abandon or to sell, or had it under consideration?

Mr. Agard: We had it under consideration, very serious consideration, quitting it, and then when we met that proposition, I said, "By George, here is a chance."

Mr. Jarman: You had it under consideration of quitting operations?

Mr. Agard: Yes.

Chairman Shafroth: Now, wait right here. Did you have an offer to sell?

Mr. Jarman: Yes.

Mr. Agard: Yes.

Chairman Shafroth: How much?

Mr. Agard: He said it was a profit over what we had invested.

Mr. Jarman: I was just going to develop that, Senator, Now, at that time, did you people have an opportunity to sell your property?

Mr. Agard: We did.

Mr. Jarman: And that offer was made by whom?

Mr. Agard: By Mr. Van Fleet of the California Chrome Company.

Counsel for claimant apparently takes a wholly inconsistent position with respect to the scope and legal effect of the contract of May 10, 1917. He contends on the one hand that the Tedoc Company was not committed by this contract to the operations which were carried on after Mr. Diller's visit; that said contract contained no covenant or stipulation to produce or ship any ore and that no penalty could attach in the event that claimant did not deliver, claimant being privileged to discontinue operations at any time. In the same brief he asserts:

106 Claimant's contract was freely made and is not tainted by fraud or misrepresentations. At the time it was made the price fixed was the highest prevailing market price (the same price



prevails today. In the absence of fraud, claimant had no alternative but to make good its agreement.

\* \* \* \* \*

The sum and substance of the conclusion reached by the Commission is to penalize claimant because it fulfilled a lawful contract according to its terms. In other words, had claimant repudiated its contract and sold its ore at higher prices, it would not, so far as the Government is concerned, have sustained any loss, *though* it would be liable in damages to the California Chrome Company for breach of contract and the amount of the damages would be a mere mathematical calculation.

Possibly the Commission was not aware of the rule of law that where parties to a contract are sui juris and the contract violates no rule of law or public policy and no fraud or imposition has been practiced, that they are bound to perform it according to its terms.

Likewise in Mr. Agard's affidavit of January 4, 1924, which was prepared by counsel, it is stated that:

Had claimant breached its contract and sold its produced ore at prices prevailing at time of delivery, it would have recouped its entire investment and suffered no losses. Affiant avers that both Carpy and Brown were men of sufficient means to have responded to any suit for damages for breach of said contract. That had claimant breached its contract with said California Chrome Company there would have been no defense which claimant could have made, and said California Chrome Company could and would have obtained and enforced a judgment against claimant.

Affiant avers that no member of said claimant ever contemplated such action nor would they or any of them do so under any circumstances. Affiant desires the Secretary to understand that this claimant kept and performed all its agreements; that the said contract of May 10, 1917, was freely and fairly entered into, that there was no fraud, duress or misrepresentation of any kind in connection therewith and that no reason existed which warranted claimant in breaching same and had it done so, such action would have been in bad faith and contrary to the laws of the State of California where said contract was executed.

\* \* \* \* \*

That the market price of 45% ore on May 10, 1917, was \$23.00 per ton; that because of the large tonnage then supposed to be available and the quick delivery expected, said company agreed to pay claimant \$27.00 per ton for 45% ore, an increase of \$4.00 per ton over the current market price. That affiant and all his said associates then believed that said offer was more than fair and in the light of conditions as then understood, that the price would result in a good profit on the deal, and the said contract for 4,000 tons was insisted upon by Carpy and Brown.

\* \* \* \* \*

That on May 10, 1917, affiant and his said associates did not expect or believe that the price of chrome would thereafter increase to such abnormal prices as did obtain; that while it is true as stated, that had claimant received the market price for chrome ore obtainable at time of delivery, instead of said contract price, that claimant would have greatly increased its profits and would have  
107 suffered no losses;—but to have done so claimant would have had to breach its contract and subject itself to a suit for damages, which damages would have amounted to a far greater sum than the losses suffered, and claimed herein. However, affiant and his said associates did not regard the breaking of said contract as honorable or legal and because thereof, claimant fulfilled its agreement, although at the time it was realized by all that because of increased prices, claimant was not receiving what it might have received but for said contract, nevertheless and without any knowledge or expectation of reimbursement for losses suffered, claimant kept its agreement and suffered the losses claimed herein.

In the judgment of the Department claimant was definitely committed under the terms of the contract of May 10, 1917, to mine and deliver 4,000 tons of chrome from the Tedoc property provided the ore was there, and obviously the road work was necessary to the accomplishment of that which was expressly agreed to be done. The purport and legal effect of the contract is clear. See:

Robert E. Lee Silver Mining Co. *v.* Omaha and Grant Smelting and Refining Company (26 Pac. 326);

Rozier *v.* St. Louis and San Francisco Railroad Co. (126 S. W., 532).

Chicago R. I. & G. Railway Co. *v.* Martin (163 S. W. 313);

Eastern Ry. Company of Minnesota *v.* Tuteur *et al.* (105 Northwestern 1067);

Minnesota Mill Company *v.* Goodnow (42 Northwestern 356);

Mississippi River Logging Co. *v.* Robson (69 Fed. 772).

Claimant had, prior to stimulation, assumed an obligation with respect to the chrome ore existing in the Tedoc property, which, however, burdensome, it had no alternative but to fulfill. It was not privileged to abandon the undertaking without the consent of the California Chrome Company. It is a principle of the law of contracts that if the thing agreed to be done is possible and lawful it must be done and that whatever is necessary to the accomplishment of that which is expressly contracted to be done is a part and parcel  
108 of the contract, though not specified. The difficulty or improbability of accomplishing the undertaking will not avail as a defense. It must be shown that the thing can not by any means be effected. Nothing short of this will excuse non-performance. The price has been fixed and the quantity had been fixed and it was expressly stipulated that any purchaser of the property would take subject to the rights guaranteed to the California Chrome Company. There were certain conditions and stipulations about the



products of the Tedoc mine which claimant had covenanted to fulfill and upon breach of this contract said company was unquestionably answerable in damages. Obviously Mr. Diller did not and could not change or modify this contract or minimize or increase the company's obligations and its loss was not affected or influenced by reason of his visit. It seems to be a case where, following a discouraging start, all the factors were carefully weighed before deciding upon a further course of procedure, and still seeing a margin of profit reasonably assured, the risks of the venture were deliberately assumed.

In this view of the matter no legal or moral responsibility rests upon the Government to assume or pay any portion of the loss sustained. The Department therefore adheres to its previous decision and the motion is denied.

E. C. FINNEY,  
*First Assistant Secretary.*

109

## EXHIBIT V.

(Copy.)

The TEDOC Claim, No. 680.

*Memorandum by the Commissioner.*

June 4, 1924.

The contention of the claimant at the present moment is that by reason of a visit by Dr. Diller on July 5, 1917, work which otherwise would have ceased through sale of the property, was continued, and that the loss which resulted from the completion of a road (there being no operating loss) should not only be reimbursed but that earlier expenditures should be repaid because claimant read published appeals prior to the Diller visit.

The claim has been denied time and again on the ground that the loss was due to a contract for sale of the entire output of ore, entered into before stimulation and by the terms of which the claimant realized some \$18,000.00 less for the ore than the prevailing market price. Claimant has insisted that at the time the said contract was executed he was being deceived by his own engineers as to the cost of the road; that disposition of the property was in mind when Dr. Diller examined the property, and that Diller's reports as to the ore bodies and the need of ore by the Government led claimant to continue.

I have examined the record. It contains many lengthy briefs, with much shifting of position on the part of claimant and, necessarily, much argument to support each change of base. In the beginning claimant objected to the decision of the Secretary because "it impairs, in fact destroys, claimant's valid contract (for sale of ore) fairly entered into and denies the right of entering into a lawful and proper contract and keeping same in accordance with the terms." It is set out in a brief that if claimant had repudiated the contract and sold



his ore at higher prices, he would not, so far as the Govern-  
110 ment is concerned, have sustained any loss, but that he would  
have been liable in damages to the California Chrome Com-  
pany for breach of contract. And Mr. Agard, in his affidavit at that  
time alleges that if claimant had breached the contract and sold the  
ore at prices prevailing at the time of delivery, he would have re-  
couped his entire investment and suffered no losses, but that had he  
done so, there would have been no defense which he could have made  
and the California Chrome Company would have obtained judgment  
for damages which would have amounted to a much greater sum  
than the loss suffered and set out in the claim.

When it was seen that on these statements the Department held  
that claimant before stimulation was definitely committed under the  
contract to mine and deliver 4,000 tons of chrome from the property,  
provided the ore was there, and that, as the road work was necessary  
to the accomplishment of that which was expressly agreed to be done,  
it was a part of the general plan, claimant, in disregard of first con-  
tention, filed a brief alleging that the contract was not a firm con-  
tract obligating claimant to deliver in any event at any cost; that  
it was optional; that claimant could have quit at any time without  
penalty; that no development of any kind had been done; that the  
property was but a prospect, and, it was asked, how could any court  
ascertain or determine the damages which could be recovered by  
reason of a breach of the contract? Conceding a breach and cause  
of action, claimant declared that only nominal damages could have  
been awarded. Quite a shift from the former declaration that a  
breach would have been followed by a judgment for damages greater  
in amount than the losses alleged in the claim.

There is no doubt that Dr. Diller urged claimant to produce, but  
claimant is not accurate when he says that such stimulation was given  
with a full knowledge of the situation. Dr. Diller knew nothing of  
the existence of a contract which compelled claimant to sell his en-  
tire output far below the market price and Dr. Diller did not  
111 know that claimant had opportunity to sell the property.

At the hearing, Mr. Agard was questioned as follows:

Commissioner Moore: Did Dr. Diller advise you not to sell out,  
or request you not to?

Mr. Agard: No, sir, in reality he didn't know anything about it.  
That was kept under the hat.

The important point is that Dr. Diller did not know when he was  
describing the ore bodies, giving the usual encouragement, and  
making the common appeal for larger production, that this claimant  
was encumbered with a contract which, under the conditions, seemed  
certain to spell financial disaster. If claimant accepted stimulation  
with so vital a fact concealed, he can hardly be placed upon the same  
footing with the claimant who withheld nothing of importance from  
the government engineer whose advice he was seeking. If Dr. Diller  
had been informed of the contract, and if he had been advised of  
the opportunity to sell the property his advice as to further opera-  
tions might have been materially different from the advice he gave.



But as to this contract, concerning which so many fine legal distinctions are sought to be drawn in the briefs, the Government, not being responsible for it is only interested in its effect upon the stimulated operations. Amid the statements that to ignore it is to violate the Constitution and the inalienable rights of man the lowly fact must not be lost sight of that the Government here is attempting to repay the net losses due to Government interference, and nothing more. The Act provides that there shall be no profits to claimants in the adjustments. If a contract with which the Government had nothing to do was the cause of the loss, directly or indirectly, it must be and is the claimant's loss; and if the contract proved profitable during the stimulated period it is still the duty of  
112 the Secretary, and not inconsistent, as claimant contends, to reimburse only the net loss. It must be remembered that these payments are a gratuity, and that the Government can limit the amount of its aid without violating the Constitution or the law. The attorney for claimant perhaps unwittingly admits this when, in his latest brief, in attempting to show that the courts would give only a nominal judgment in case of breach of the contract, he says that, in the administration of a remedial Act, the common law rules, if applicable, should not be enforced.

After examining the record, it is my opinion that the Government was not responsible for the loss, because the Government was not responsible in any manner for the contract which caused the loss. The contention that the loss was not due to the contract, but to the increased cost of the road to the property, appears without reason. A means of transportation had to be taken into consideration at all times, whatever its cost, and it was. The very first money expended, aside from the purchase price, was upon the road. To attempt to disassociate it from the general operations is most futile. If it had not been for the fact that claimant was compelled by the terms of the contract to sell his ore far below the prevailing market price, there would have been no loss notwithstanding the final cost of the road. To saddle upon the Government the loss due to the contract, because the claimant's own engineers made false or mistaken reports as to the cost of the road, and because Dr. Diller, ignorant of the handicap under which claimant was working, urged production, appears to me unjustifiable.

The operation upon the property had its inception before any possible government stimulation, the first payment on purchase being made on April 13, 1917. Claimant, while still contending that its principal loss was due to a patriotic desire to respond to appeals made by Dr. Diller, now alleges earlier stimulation through  
113 the President's message on April 21, 1917, and asks repayment of the earlier expenditures. It may be that the real object is to bring the purchase of the property within the stimulated period, in anticipation of a favorable decision on purchase price of property by the Supreme Court of the United States, as there was no production and an in-consequent outlay prior to Dr. Diller's visit. But in making this claim for earlier stimulation

claimant discounts his contention as to intense and unusual patriotism, because, despite the President's appeal and the subsequent appeals to which he refers, he states he intended to quit when Dr. Diller came on the scene.

As to the effect Dr. Diller's visit had upon claimant, I am of the opinion that, as claimant was then considering the situation from a cold-blooded business standpoint, — Diller furnished the information which claimant thought warranted him in operating rather than selling the property. Claimant's first engineers had made most unreliable reports on the value of the property but when Dr. Diller, after examination, described the ore bodies enthusiastically and prophesied unheard of prices for ore during the coming year, claimant concluded, as Mr. Agard testified, that it would be a paying proposition and claimant would not sell. It was in the expectation of profit that the work went on and two other properties, which also were subject to the contract were operated. The expectation of profit would be no bar to claimant under the Act, but it places the claim upon the same basis, so far as patriotism is concerned, with other claims before the Commission. The instrument that does bar the claimant from reimbursement is the contract for the sale of its product, made before stimulation, and the breaching or fulfilling of which was not knowingly influenced from him, and was only influenced indirectly through — Diller's report that large bodies of rich ore existed in the properties, which ore probably would bring a big price on later markets.

I find no reason to disturb the decision promulgated in the claim.

JOHN BRIAR,

*Commissioner War Minerals Relief Commission.*

114

EXHIBIT W.

Department of the Interior,  
Washington.

THE TEDOC COMPANY. Claim No. 680. War Materials Relief Act.  
Chrome.

*Petition Denied.*

June 14, 1924.

This claim was considered by the Department under the original War Minerals Relief Act of March 2, 1919 (40 Stat., 1274), and rejected. It was reconsidered under the amendatory act of November 23, 1921 (42 Stat., 322), and again rejected. And on rehearing, wherein the history of the claim was reviewed in detail, the Department declined to modify its previous finding.

Counsel has now filed a petition requesting further consideration.

All the questions presented and so forcibly urged were fully considered by the Department. Every important consideration bearing



upon the matter has been thoroughly weighed and no reason is found to entertain an opinion different from that heretofore expressed.

The petition is, therefore, denied.

E. C. FINNEY,  
*First Assistant Secretary.*

115

EXHIBIT X.

June 17, 1924.

Hon. Hubert Work,  
Secretary of the Interior,  
Washington, D. C.

SIR:

In the Matter of the Claim of THE TEDOC COMPANY. Claim No. 680.  
War Minerals Relief Act.

Claimant respectfully petitions for an oral hearing of the above claim after adverse decision by the First Assistant Secretary, at such time as may be convenient. This request is based upon the following grounds:

(1) Because claimant has complied with every condition required by the Acts of Congress under which it is pending.

(2) Because there is no dispute of fact in the record.

(3) Because the uncontradicted facts in the record clearly entitle claimant to an award.

(4) Because the decision denying an award is based on erroneous conclusions respecting matters wholly irrelevant to the matters which Congress has directed the Secretary to consider.

(5) Because the decision complained of misconstrues a written contract, and because of such misconstruction or misinterpretation, denies claimant an award which it is otherwise concededly entitled to.

(6) Because the decision denies claimant stimulation under published request which has been granted to other claimants upon the identical proof presented herein.

Counsel's insistence in this matter is because of a personal knowledge of all the facts of this claim at and during the time of operations resulting in the losses claimed and ever since and a  
116 knowledge that this claim is fair and just; that a denial of relief will be an injustice to the claimant, and in our opinion will be contrary to the will of Congress.

This claimant is one of the very few claimants who produced a necessary war mineral which was actually used by the Government in the prosecution of the war. This claimant produced when it was needed,—90% of the claims filed and in which awards have been made, did not produce for actual use in the war.

Because of our knowledge of the merits of this claim and because erroneous legal conclusions are relied upon to defeat a just claim that would otherwise be conceded, it is respectfully requested, in

order that justice may be done claimant, that an oral hearing be granted.

Respectfully submitted,

A. H. JARMAN,  
*Attorney for Claimant.*

117

## EXHIBIT Y.

Department of the Interior,  
Washington.

THE TEDOC Co. Claim No. 680. War Minerals Relief Act. Chrome.

*Reopening Denied.*

July 25, 1924.

This claim has received exhaustive consideration by the Department on numerous occasions. It was recommended for disallowance by the first Commission and was rejected by the Department October 26, 1920, based upon a finding that the company had, prior to the date of stimulation, entered into a certain contract for the sale of its product, which contract served as a definite measure of its intended mining operations, and that its losses were occasioned by its inability to receive the current market price for its ores. In other words claimant did not incur a loss due to the request of Dr. Diller, inasmuch as all expenditures made after the date of such request were necessary to the carrying out of the contract with the California Chrome Company.

Thereafter the claim was reconsidered under the amendatory act of November 23, 1921 (42 Stat. 322), and November 8, 1923, it was again rejected. On motion for rehearing the history of the operation was reviewed in detail and the previous decision was adhered to March 29, 1924. Petition for further consideration was denied June 14, 1924.

Counsel thereafter requested, and on July 7, 1924, was granted an oral hearing but no sufficient reason is seen for disturbing the action heretofore taken and the case will not be reopened.

(Signed)

HUBERT WORK,  
*Secretary.*



118

## EXHIBIT Z.

Department of the Interior,  
Washington, D. C.

In the Matter of the Claim of TEDOC COMPANY, San Francisco, California. No. 680. Chrome. War Minerals Relief.

*Affidavit of W. A. T. Agard in Re Contract May 10, 1917.*

STATE OF CALIFORNIA,

*City and County of San Francisco, ss:*

W. A. T. Agard, being first duly sworn, deposes and says:

That I am interested in Tedoc Claim and had active charge of all business matters of said Company during operations conducted in 1917 and 1918, and am thoroughly familiar with the contract of May 10, 1917, between California Chrome Company and Tedoc Company, and all facts and circumstances connected therewith, and more particularly I know what the parties of said contract intended when they entered into said agreement and in this respect affidavit states the facts to be:

That when said contract was entered into, May 10, 1917, no member of Tedoc Company knew whether ten tons or one thousand tons of chrome ore would be produced in the undertaking which was then commenced. Tedoc operations were then a new business, one that no member of the Company had any experience in, save and except affiant and even affiant had had no mining experience in chrome ore. Both Mr. Huffard and Mr. Van Fleet of California Chrome Company knew at the time that this was a new enterprise and that Tedoc Company had had no previous experience or knowledge of the business. They also knew at the time that no chrome ore had been developed by any mining operations on the Tedoc Mountain deposits which was expected to be operated by the Tedoc Company.

119 Affiant has been advised by counsel for Tedoc Company that the Secretary has denied an award to Tedoc Company herein because the said contract of May 10, 1917, in effect obligated Tedoc Company to produce and fulfill irrespective of any requests made by Dr. Diller; in other words, affiant understands that an award has been denied because the Secretary holds that the said contract so obligated Tedoc Company to deliver that it had no alternative but to fulfill, therefore Dr. Diller's request could not have influenced Tedoc Company to continue operations after discovery of the fraud respecting road conditions, and that this contract was such that Tedoc Company was not permitted to quit operations as it then contemplated.

Respecting this contract affiant states that said contract did not obligate Tedoc Company to so operate and that neither party so

understood or intended and that said contract did not and it was not intended to obligate Tedoc Company so as to prevent it from quitting operations at any time it so desired.

When said contract was entered into it was thoroughly understood and agreed between Tedoc Company and California Chrome Company that Tedoc Company was only to be obligated under the contract in the event it operated Tedoc Mountain deposit and produced chrome ore of the grade specified in the contract;—in such event all ore produced was to be delivered to California Chrome Company.

It was thoroughly understood and agreed at the time, and both parties so understood, that in event Tedoc Company did not produce any chrome ore from Tedoc Mountain deposit that no liability would follow or attach to Tedoc Company by reason of the contract.

That California Chrome Company never at any time by word or act indicated that it intended or understood that Tedoc Company was obligated under this contract to fulfill in any event.

120 The only obligation intended by said contract, and this intention was so understood by both parties and acted upon at all times, was as follows, to-wit:

That so long as Tedoc Company was engaged in producing Chrome ore from Tedoc Mountain deposit that all such ore was to be delivered to California Chrome Company under the terms of the contract, and that if Tedoc Company did not produce one pound of chrome ore from Tedoc Mountain deposit, that no liability was incurred under the contract to California Chrome Company.

W. A. T. AGARD.

Subscribed and sworn to before me this 22nd day of August, A. D. 1924.

W. W. HEALY, [SEAL.]  
*Notary Public of the State of California in and  
for the City and County of San Francisco.*

121

EXHIBIT ZA.

California Chrome Company, Forty-second Street Building.

San Francisco Office: Kohl Building.

New York, August 7, 1924.

Mr. A. H. Jarman,  
1014 Vermont Ave. N. W.,  
Washington, D. C.

DEAR MR. JARMAN:

I am in receipt of your letter of August 6th in reference to claim of the Tedoc Company regarding certain contract of May 10, 1917, with the California Chrome Company.

This contract was made with the Tedoc Company, at what developed later to be a very low price, and the price was increased



several times by the California Chrome Company to encourage and assist the Tedoc Company in developing their property.

We did not feel at any time, under this contract, that the Tedoc Company was under an obligation to the California Chrome Company provided they did not produce ore. The obligation of the Tedoc Company, as we understood same, was that if they did produce and deliver ore to the Railroad Company, it was to be sold to the California Chrome Company at the contract price.

I am not familiar and have not entered into any discussion arising from claims made against the Government in connection with the production of Chrome Ore, but wish to say that I feel, having been thoroughly familiar with this whole situation, that the Tedoc Company used their best efforts at all times to produce a maximum tonnage of ore. Whether their efforts were influenced by any conversation with Dr. Diller, I am unable to say, but I always did feel that the men connected with the Tedoc Company were honorable and square.

If the Tedoc Company had not produced a ton of ore under their contract of May 10, 1917, the California Chrome Company  
122 would not have made any claim against them.

It is my personal recollection that before the visit of Dr. Diller, as spoken of in your letter, of July 10, 1917, when I first visited the property of the Tedoc Company, I advised against the completion of the road unless sufficient tonnage had been developed to warrant the increased cost as estimated at the time of my visit. I remember, however, that this advice was not taken and that the road was completed.

The above facts are as I remember the situation with reference to the Tedoc Company, operating west of Red Bluff, California.

Very truly yours,

JNO. B. HUFFARD,  
*Vice-President.*

JHB. P.

123

EXHIBIT AA.

Department of the Interior,  
Washington.

*In re* THE TEDOC COMPANY. Claim No. 680. War Minerals Relief Act. Chrome.

Jan. 6, 1925.

This claim has been rejected again and again upon the ground that the company prior to the date of stimulation entered into a contract for the sale of its product at a stipulated price and that its loss was due to the contract; that because of the contract the company could not and did not receive the current market price for its ore. The claim has had consideration under the original Act and reconsideration under the Amended Act. In 1924 counsel twice was

granted oral hearing and in addition, briefs and supplemental briefs were filed and considered.

Considering now and finally every fact and factor, legal and otherwise, that has been brought out in written briefs and oral hearings, and upon reexamination of the entire record, it is held that the Government was not responsible for the loss and that no reimbursement can be made. It appears from the record that Mr. Diller, an authorized Government agent, did urge production, upon the basis of Government needs, and did hold out the inducement of increasing demand and increasing prices for ore, but the record also shows that Mr. Diller had no knowledge of the existence of the contract, that highly important factor being concealed from him by claimant. Claimant, therefore, does not stand in the position of claimants generally to whom Government appeal was made. It must be remembered that the Government was not asking any person to engage in a hopeless project, where financial failure was a foregone conclusion. The Government was urging increased production but always there was present the element of profit for the operator; and, if, as  
124 in this case, there existed a contract which was an insurmountable handicap, the loss due to it should not be taken from the shoulders of those alone responsible for it and put upon the Government simply because the mining of chrome was urged by the Government during the war. It was because the expected profits were not realized and because the Armistice brought in their stead actual losses that the Relief Act was passed. The Act contemplates reimbursement for losses due to Government interference only, and it can not be extended to cover transactions by claimants before such interference the effect of which was to deprive them of the benefit of the high prices which came later. In this case claimant, who made the contract prior to contract with Diller, must bear the responsibility for his own uninfluenced act. Claimant knew and Diller did not know that the contract was in existence and Diller's appeals under such conditions created no Government obligation for losses resultant from the contract.

The claim is denied.

(Signed)

HUBERT WORK,  
*Secretary.*

125

EXHIBIT BB.

Department of the Interior,  
War Minerals Relief,  
Washington.

*Memorandum in Review of Claim No. 440, John A. Jensen, Louis Main, John Toat, Sugar Loaf, Colorado.*

May 9, 1923.

In motion for rehearing claimants show stimulation as of April 17, 1917. The original Commission did not go into the merits of



the claim, but denied it on the ground of an specific request to produce.

\* \* \* \* \*

I recommend an award of \$1,630.25 to claimants.

JOHN BRIAR,  
*Commissioner.*

Department of the Interior,  
Washington.

*In re* John A. Jensen, Louis Main, and John Toat. Claim No. 40.  
Tungsten.

May 25, 1923.

In the above claim under the war Minerals Relief Act \* \* \*  
an award is made in the sum of \$1,630.25.

E. C. FINNEY,  
*First Assistant Secretary.*

126 *Affidavit.*

STATE OF COLORADO,  
*County of Boulder, ss:*

John A. Jensen, of lawful age, being first duly sworn, says:

\* \* \* that this affiant read President Wilson's message that was issued some time in April 1917, and the same was published in the daily Camera, a newspaper published at Boulder, Colorado, or in the Boulder County Miner, on or about the 16th or 17th of April, 1917. \* \* \*

These words as I remember it, were used in President Wilson's message which I read, and that by reason of said message \* \* \* caused me to continue my efforts and stimulated my partners and I in the mining of tungsten; \* \* \* JOHN A. JENSEN.

Subscribed and sworn to before me this 24th day of July A. D. 1922.

My Commission expires July 23, 1923.

[SEAL.]

JAMES E. KIRKBRIDE,  
*Notary Public.*

127 EXHIBIT CC.

In the Matter of the Claim of C. H. CRAIG. #1074.

STATE OF COLORADO,  
*County of Boulder, ss:*

C. H. Craig, being first duly sworn, says:

That he was in the tungsten mining business from 1915 to 1918 producing tungsten ores; \* \* \* that early in 1917 he had de-

cided to abandon the underground workings of the mine, make a clean up of the surface, and retire from tungsten mining, because of debts incurred in the industry and because of the fact that his son, Harvey C. Craig, was about to enlist and later did enlist in the United States Army.

That on Monday, April 16th, 1917, President Wilson's appeal to produce tungsten and other war minerals for the aid of the forces of the United States in the war, was published in the News-Herald, a daily newspaper of Boulder, Colorado, which appeal came to the attention of the deponent.

That about the same time a poster was posted in the Post Office at Tungsten, Boulder County, Colorado, containing an appeal of President Wilson to the metal miners of the country to produce minerals, of which the attached instrument is a photographic reproduction.

\* \* \*

\* \* \* And that because of the appeals and solicitations, and because of patriotic fervor and because of a sense of duty to aid in the war then being waged, the deponent continued to mine and produce tungsten ores.

C. H. CRAIG.

Subscribed and sworn to before me this 8th day of February, A. D. 1922.

[SEAL.]

RUDOLPH JOHNSON,  
*Notary Public.*

My commission expires April 17, 1923.

128

Department of the Interior,  
Washington.

*In re* C. H. CRAIG. Claim No. 1074. War Minerals Relief Act.  
Tungsten.

This is a claim under Section five of the Act of March 2, 1919 (40 Stat., 1274), as amended by the Act of November 23, 1921, (42 Stat. 322) for alleged losses \* \* \* sustained in producing \* \* \* tungsten.

\* \* \* The claim was rejected by Secretary Lane \* \* \* because there was no request or demand. Motion for rehearing was filed under the amendatory act, *supra*, and from the showing made, stimulation may be conceded as of April 20, 1917, through published solicitations and appeals. \* \* \*

The venture, however, was a losing one and claimant states under oath, that early in 1917 because of debts \* \* \* he decided to close sown \* \* \* and abandon the enterprise. He was induced, however, as hereinabove stated to resume and continued till about September 1, 1918. \* \* \*

\* \* \* Upon due consideration of the record an award is made in the sum of \$827.10.

E. C. FINNEY,  
*First Assistant Secretary.*



129

## EXHIBIT DD.

Department of the Interior,  
Before the War Minerals Relief Commissioner,  
Washington, D. C.

Re the Claim of THOS. G. McGRATH, Trustee, Boulder, Colorado.  
Claim No. 605.

*Supplemental Motion for Rehearing.*

Now comes Thomas G. McGrath, trustee in the above entitled cause, for himself and his copartners, and submits the following additional evidence and exhibits in support of claimant's motion for a rehearing filed prior to February 15, 1922. \* \* \*

That in April 1917, many articles appeared in the daily newspapers in reference to the scarcity of tungsten and among others was an appeal over the signature of the President of the United States, enlisting the miners in the great service Army. Claimant's attention was called to this article in the Rocky Mountain News, a daily newspaper of general circulation, published at Denver, Colorado, in which said article appeared on April 16, 1917, a photostatic copy of which is herewith submitted as Exhibit A. Claimant saw and read the articles in its entirety within three or four days of its publication and was very much impressed by the appeal of the President, especially the paragraph addressed "To the Miner," containing the following:

"To the Miner:

Let me say that he stands where the farmer does; The work of the world waits on him. If he slackens or fails armies and statesmen are helpless. He is also enlisted in the great service army."

Claimant thereupon and in response to this appeal enlisted the aid of his associates, J. E. Grady, R. Fay and J. Alex, and secured a lease on the Reeves Mine and commenced operations on May 1, 1917, and continued the operations until January 1918. \* \* \*

THOMAS G. McGRATH,

*Trustee.*

Duly verified.

130     *Memorandum in Review of Claim No. 605, Thomas A. McGrath et al., Boulder, Colo. Tungsten.*

This is the claim of Thomas A. McGrath, Joe Alex, Robert Fay and J. E. Grady, a co-partnership, under Section 5 of the Act of March 2, 1919, (40 Stat. 1272), as amended by the Act of November 23, 1921, (42 Stat. 322).

The claim was denied November 12, 1919, upon recommendation of the former Commission based upon a finding of no request or demand within the terms of the original act.

Claimants have now filed a motion for rehearing under the amendment in which they have made a sufficient showing of stimulation through publication, prior to the date of beginning operations.

Accordingly an award of \$2,714.50 is recommended in this case.

IRA E. ROBINSON,  
*Commissioner.*

131 Department of the Interior,  
Washington.

*In re* THOMAS G. McGRATH, Trustee. Claim No. 605. Tungsten.

Feb. 26, 1923.

In the above claim under the War Minerals Relief Act, Section five, Act of March 2, 1919 (40 Stat., 1274) as amended, upon a due consideration of the record, an award is made in the sum of \$2,714.50.

(Signed)

E. C. FINNEY,  
*First Assistant Secretary.*

132 EXHIBIT EE.

Department of the Interior,  
Washington, D. C.

In the Matter of the Claim of HARRY V. NORTON. Claim No. 561.

*Affidavit*

Harry V. Norton, of lawful age, being first duly sworn, says:

\* \* \* that while it is true as stated by the Honorable First Assistant Secretary of the Interior in his finding, that this affiant did not start leasing operations in response to any request or demand of the Government in any way, shape or form, the facts are, that at or about the time war was declared against Germany by the United States Government, it issued a proclamation placing an embargo upon the exportation of all tungsten produced in America and that by reason thereof the price of tungsten fell to a point which was below the cost of production; that notwithstanding this fact, this affiant continued operations on his said lease by virtue of the stimulation contained in President Wilson's message to the miners to produce for the needs of the United States Government and that by reason thereof, this affiant was led to believe and did believe \* \* \* that although the price of tungsten had slumped to a point which rendered the further operations of his said tungsten lease unprofitable \* \* \* and had it not been for the urgent demand of the



United States \* \* \* made by the president of the United States in April 1917, this affiant would have suspended operations and gone to work at day's pay \* \* \*.

HARRY V. NORTON.

Subscribed and sworn to before me and in my presence this 7th day of July A. D. 1923.

[SEAL.]

GEORGE J. BREITENSTEIN,  
*Notary Public.*

My commission expires October 21, 1926.

133

Department of the Interior,  
Washington.

*In re* HARRY V. NORTON. Claim No. 561. War Minerals Relief Act.  
Tungsten.

June 27, 1924.

\* \* \* an award is made in the sum of \$3,443.79.

E. C. FINNEY,  
*First Assistant Secretary.*

134

EXHIBIT FF.

California Chrome Company, Kohl Building.

San Francisco, California, May 10, 1917.

Tedoc Mining Co.,  
Messrs. Agard & Stewart, Mgrs.,  
268 Market St.,  
San Francisco, Calif.

GENTLEMEN:

Please ship during 1917, as we instruct four thousand (4,000) net tons of chrome ore averaging 40% and above contained chromic oxide, it being understood and agreed that we are not to accept any chrome ore containing less than 40% chromic oxide, or which is not properly cleaned and cobbled.

Shipping instructions will be given you on advice from you that you are ready to make shipments.

Price to be sixty (60¢) per unit of contained chromic oxide per net ton of 2,000 lbs. f. o. b. cars main line railroad points in California.

Payments on such ore to be made on the basis of 90% of value of presentation of bills of lading showing railroad weights. Value is to be calculated on Bank's analysis of reliable sample furnished him. Final adjustment and settlement for each consignment to be made on receipt of analysis from consignee. You will have the privilege of having Ledoux & Company of New York sample ship-

ments and settlement will be made according to their sample, provided you pay the cost of such work.

It is understood and agreed that this chrome ore is to be produced from the Tedoc Mountain deposit and that before the expiration of this order, we have the option of purchasing during 1918, upon the same terms and conditions as herein contained, any unfilled portion of this order.

135 The minimum carload weights of chrome ore under the existing rates for chrome ore is 80,000 pounds, and it is understood that you will protect this minimum. In case cars are not loaded to such respective minimum, you will pay freight on the difference between the actual weight and such minimum weight.

It is also agreed that any transfer of ownership shall be made subject to this order. This order shall be considered as filled should the Tedoc Mountain deposit become exhausted before 4,000 tons have been produced.

This order does not extend beyond January 1st, 1918.

CALIFORNIA CHROME CO.,  
By J. R. VAN FLEET.

In addition to the above prices quoted we will agree to pay five cents per unit (5 cents) for all ore which contain over 5% Chromic Oxide.

CALIFORNIA CHROME COMPANY,  
By J. R. VAN FLEET.

Tedoc Co., Agard & Stewart, Mgrs.

Accepted per

W. A. T. AGARD,  
FRANK H. STEWART.  
JAMES BROWN.  
C. CARPY.

136

EXHIBIT GG.

*Memorandum in Review of Claim No. 647, Salt Lakes Tungstania Mines Co., Preston, Idaho.*

JB—WCS.

January 23, 1923.

This claim was rejected by the former commission because specific request to produce was not shown.

In the application for rehearing stimulation based upon published appeals was alleged. The showing was found to be insufficient and a list of questions was submitted to the officers of the company. Replies under oath were made in due course, and they are held to meet the requirements as to stimulation.

Claimant was operating a tungsten property at the outbreak of the war, having engaged in the business because of the high price of tungsten then prevailing. In the spring of 1917, the price of the ore had slumped and the stockholders were discouraged and inclined



to quit, when the President issued his appeal to miners. This, it is alleged, caused them to continue when, otherwise they would have stopped. The date of such interference was April 21, 1917. It is not shown that they increased their efforts—they simply continued. It is alleged that, later, when visited by an agent of the Government, they practically doubled the working force \* \* \*

The amount claimed originally was \$50,938.07. This was reduced to \$30,332.38 in audit, the deductions being accepted by claimant. The claim is subject to further deductions \* \* \*

I recommend an award of \$19,859.55 to claimant.

IRA E. ROBINSON,  
*Commissioner.*

137

*Rule to Show Cause.*

Filed February 19, 1925.

\* \* \* \* \*

Upon consideration of the petition filed in the above entitled case it is by the court this 19th day of February, 1925, ordered:

That the respondent, Hubert Work, Secretary of the Interior, be, and he hereby is, required to show cause, if any he can, on or before the 19th day of March, 1925, at 10 o'clock A. M., why the writ of mandamus should not issue, as in the petition prayed: Provided, That a copy of said petition and of this order be served upon said respondent on or before the 28th day of February, 1925.

WILLIAM HITZ,  
*Justice.*

*Respondent's Answer.*

Filed May 12, 1925.

\* \* \* \* \*

Comes now the respondent Hubert Work, Secretary of the Interior, and by way of return to the rule to show cause herein issued and for answer to so much of the relators' petition as he is advised is material, says:

That, as appears from the relators' petition and the Exhibits "C", "G", "H", "J", "L", "Q", "U", "V", "W", "Y" and "AA" thereto attached, the relators duly filed their *calim* under the act of March 2, 1919, for alleged net losses incurred in the production of chrome, alleging that the same was sustained by reason of producing  
138 said mineral in compliance with the request of a representative of the Department of the Interior to supply the urgent needs of the Nation in the prosecution of the war with Germany; that the respondent took jurisdiction of the said claim and heard and considered all evidence adduced in support thereof; that after due consideration, being fully advised as to each and every element

and factor, he found and adjudged that the relators sustained no losses in producing chrome in compliance with the request of any officer of the Government, and was not justly and equitably entitled to any award therefor; that, more specifically, the losses shown and claimed by the relators were not due to operations begun and continued under stimulation, that is to say, request or demand of an accredited officer of any of the Departments or Boards mentioned in the said act of March 2, 1919, but were in fact due to contractual obligations incurred by the relators prior to said stimulation, as more particularly appears in the several decisions of the Department attached as exhibits to the relators' petition as aforesaid. He is advised and avers that his decision in said claim is conclusive and final and not subject to review in this or any court in this or any proceeding.

Wherefore, having made full and complete answer to the petition he prays that the rule herein issued may be discharged, that the petition may be dismissed with his reasonable costs and that he may be permitted to depart hence without day.

HUBERT WORK,  
*Secretary of the Interior.*

C. EDWARD WRIGHT,  
*Attorney for Respondent.*

139 DISTRICT OF COLUMBIA, ss:

Hubert Work, Secretary of the Interior, on oath says that he has read over the foregoing answer and is acquainted with the contents thereof; that he is informed that the matters of fact therein set forth are true, and he believes them to be true.

HUBERT WORK,  
*Secretary of the Interior.*

Subscribed and sworn to this 8<sup>th</sup> day of May, 1925, before me  
[SEAL] W. BERTRAND ACKER,  
*Notary Public in and for the District of Columbia.*

*Relator's Answer to Respondent's Return.*

Filed May 19, 1925.

\* \* \* \* \*

Comes now the relator, Tedoc Company, and, answering respondent's return herein, denies, admits and avers as follows, to wit:

1. Denies that respondent took jurisdiction of the said claim and heard and considered or heard or considered all the evidence adduced in support thereof; denies that, after due consideration thereof said Secretary found and adjudged or found or adjudged that relators sustained no losses in producing chrome in compliance with the request of any officer of the Government; denies that after due consideration of all the evidence adduced by the relators in support of



said claim, the said Secretary found and adjudged or found or adjudged that relators sustained no losses in producing chrome  
140 in compliance with the request of any officer of the Government; denies that the Secretary considered all the evidence adduced in support of said claim; denies that relators are not justly and equitably or justly or equitably entitled to any award; denies that the Secretary made investigations on the merits of said claim; denies that he determined on the merits that relators were not justly and equitably or justly or equitably entitled to any award.

Relators admit that the Secretary of the Interior denied adjustment of the losses claimed on the sole ground and reason that said Secretary held, as a matter of law, that relator's operations were not continued by reason of the request or demand of an accredited officer of any department or board mentioned in the said Act of March 2, 1919.

Relators admit that the Secretary's denial and refusal to adjust and liquidate relators' net losses suffered, as in the petition set forth, was due to the Secretary's consideration and construction as a matter of law of a contract for the sale of ore entered into by relators with the California Chrome Company on May 10, 1917, and in this behalf relators aver the facts to be that, because of said contract and the Secretary's construction of said contract and his conclusion as to its legal effect, the said Secretary has refused to take jurisdiction of relators' claim on its merits, and has denied same solely and only because he holds, as a matter of law, that the said contract of May 10, 1917, was and is a firm contract that obligated relators to continue  
operations irrespective of a direct personal demand made to  
141 relators by the Hon. J. S. Diller, of the United States Geological Survey, on July 10, 1917.

Relators aver that said sales contract is not and never was in law a firm contract and was never intended by the parties to said contract as a firm contract and in this connection relators aver that they have submitted evidence under oath to the Secretary of the Interior to the effect that said sales contract was and is not a firm contract but permissive only as fully appears from the exhibits attached to relators' petition; that there is no evidence of any kind or nature before said Secretary respecting said contract other than that submitted to said Secretary as aforesaid; that said Secretary has failed, neglected and refused to consider such evidence: relators therefore aver that the decision of said Secretary in holding said sales contract to be a firm contract as a matter of fact is purely arbitrary and capricious and his said decision as a matter of law is erroneous; that by reason of said Secretary's arbitrary and capricious decision on a question of fact and his erroneous decision as a matter of law—relators have been denied an adjustment of net losses suffered by reason of producing chrome at the direct and personal demand of the Department of the Interior for the use of the Nation in the prosecution of the war.

Relators admit that a just and equitable decision of the Secretary of the Interior on questions of facts is conclusive and final and not subject to review in any court in any manner, but relators deny that

the Secretary's decision on a matter of law is conclusive and  
 142 final and aver the fact to be that the Congress of the United  
 States has not made the Secretary's decision on questions of  
 law conclusive and final and that Congress has no power, under the  
 Constitution, to make such decisions conclusive and final.

Wherefore, having made full and complete answer to the return,  
 relators pray that a writ of mandamus issue commanding the  
 Secretary of the Interior to take jurisdiction of relators' claim on its  
 merits; that he proceed with his said jurisdiction and hear and  
 consider the evidence adduced by relators in support of their said  
 claim; that he make investigations for and on behalf of the Govern-  
 ment as to the merits of said claim and that he make findings of  
 fact on the losses claimed and that he justly and equitably ascertain  
 and declare such losses on their merits, if any, and that relators  
 recover their costs herein expended.

F. E. SCOTT,  
*Attorney for Relators.*

A. H. JARMAN,  
*Of Counsel.*

STATE OF CALIFORNIA,  
*County of Alameda, ss:*

W. A. T. Agard, being first duly sworn, deposes and says:

That he is one of the associates or copartners of Tedoc Company,  
 relator; that during the entire period of operations conducted by  
 said Tedoc Company affiant acted as general manager and had  
 knowledge of its affairs; the affiant has had charge of said claim,  
 number 680, before said Secretary of the Interior and has  
 143 kept informed of all proceedings before said Secretary, and  
 therefore makes this verification in behalf of said Tedoc  
 Company and his associates; that affiant has read the foregoing  
 answer to respondent's return and knows the allegations therein  
 and the same are true.

Subscribed and sworn to before me this — day of —, 1925.

\_\_\_\_\_  
*Notary Public of the State of —.*

Verification waived.

C. EDWARD WRIGHT,  
*Attorney for Respondent.*

Received a copy of the within answer this 16th day of May, 1925.

C. EDWARD WRIGHT,  
*Attorney for Respondent.*



*Demurrer to Relators' Replication.*

Filed May 26, 1925.

\* \* \* \* \*

The respondent says that the relators' replication is bad in substance.

HUBERT WORK,  
*Secretary of the Interior,*  
By His Attorney, C. EDWARD WRIGHT.

144 NOTE.—Among the matters of law to be argued on demurrer are:

1. The replication tenders no issue on any fact material to the determination of relators' right to the writ of mandamus.

2. The several decisions of the respondent attached to relators' petition and made a part of the pleadings herein, on and in relation to relators' claim for net losses in producing ore under the terms of the War Minerals Relief Act, when the same on the several occasions shown by relators' petition was before the respondent, show what the Secretary held and decided, and in particular show that he took full jurisdiction over relators' claim in its entirety and considered each and every element thereof in exercising his judgment as to whether on the facts before him relators incurred any net losses which it would be just and equitable to adjust and allow.

3. The consideration of relators' claim involved judgment and discretion both in construing and applying the law and in the finding of facts, and the respondent's judgment is final and conclusive and not subject to review by the courts in this or any proceeding brought by relators.

4. The action in substance is one against the United States which has not been made a party thereto and has not in this behalf consented to be sued.

*Memorandum of Court.*

Filed July 23, 1925.

\* \* \* \* \*

145 As I construe the decisions in the Rives and Chestertee cases, they were decided on two grounds, first that the Secretary of the Interior had jurisdiction to construe the Dent Act as to what items of losses should be allowed, and second that the pleadings showed that the claims of the relators had been considered and rejected.

I see no difference in principle between those cases and the instant cases. It is true that the replications of the relators deny that

the Secretary considered their claims, but the exhibits to the petitions show that he did.

The demurrers to the replications will be sustained.

BAILEY, J.

Supreme Court of the District of Columbia.

Thursday, July 23d, 1925.

Session resumed pursuant to adjournment, Mr. Justice Bailey, presiding.

\* \* \* \* \*

Upon consideration of the demurrer of respondent filed herein to the relator's replication, it is ordered that said demurrer be, and the same is hereby sustained.

*Order for Appearance.*

Filed August 24, 1925.

\* \* \* \* \*

The Clerk of said Court will please note my appearance for the defendant in this cause.

DONALD V. HUNTER,  
*Attorney for Defendant.*

Supreme Court of the District of Columbia.

Tuesday, August 25th, 1925.

Session resumed pursuant to adjournment, Hon. Walter I. McCoy, Chief Justice, presiding.

\* \* \* \* \*

This cause came on to be heard upon the petition, the rule to show cause, the answer to said rule and petition, the traverse of said answer, and the demurrer to said traverse, and after argument by the said attorneys of record, was submitted to the Court. Whereupon, the same being considered, it is ordered that said demurrer be, and the same is hereby, sustained; thereupon the relator by its attorneys elects to stand upon its said traverse.

Wherefore, it is considered and ordered that relator take nothing by this action, that respondent go hence without day, be for nothing held, and recover of relator his cost of defense, to be taxed by the clerk and have execution thereof.

From the foregoing judgment, the relator, by his attorneys in open court, notes an appeal to the Court of Appeals; whereupon the maximum of an undertaking for costs is hereby fixed in the sum of



\$100 with leave to deposit the sum of \$50.00 with the clerk in lieu thereof.

Done in open court, this twenty-fifth day of August, 1925.

*Memorandum.*

August 25, 1925.--\$50 deposited in lieu of undertaking on appeal

147

*Assignment of Errors.*

Filed August 25, 1925.

\* \* \* \* \*

Now comes the Relator, Tedoc Company, by its attorneys, and assigns as error in the above entitled cause, the following:

1. The Court erred in sustaining the demurrer of Respondent to the traverse of Relator.
2. The Court erred in not overruling the demurrer of Respondent to the traverse of Relator.
3. The Court erred in ruling that Relator is not entitled to the writ of mandamus, as prayed for in Relator's petition.
4. The Court erred in refusing to issue the writ of mandamus, as prayed for in Relator's petition.
5. The Court erred in entering judgment for Respondent.

F. E. SCOTT,

*Attorney for Relator and Appellant.*

A. H. JARMAN,

*Of Counsel.*

*Designation of Record.*

Filed August 25, 1925.

\* \* \* \* \*

The Relator having perfected an appeal herein to the Court of Appeals of the District of Columbia, on the twenty fifth day of August, A. D. 1925, hereby requests the Clerk of the Supreme Court of the District of Columbia to prepare, at Relator's expense, a transcript of the record on appeal, including therein the following papers  
148 and proceedings, namely:

1. Petition.
2. Rule to show cause.
3. Answer.
4. Traverse (designated replication).
5. Respondent's demurrer to Relator's traverse.
6. Order by Mr. Justice Bailey sustaining Respondent's demurrer to Relator's traverse.

7. Judgment for Respondent; appeal in open court; appeal bond fixed.

8. Memorandum of Deposit of \$50.00 cash with Clerk in lieu of undertaking.

9. Assignment of Errors.

10. Designation of Record.

11. Appearance of Attorney for Respondent.

F. E. SCOTT,  
*Attorney for Relator and Appellant.*

A. H. JARMAN,  
*Of Counsel.*

Service of copy of the foregoing Designation is acknowledged this 25 day of August, A. D. 1925.

DONALD V. HUNTER,  
*Attorney for Respondent & Appellee.*

149 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,  
*District of Columbia, ss:*

I, Morgan H. Beach, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 148, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 69893 at Law, wherein United States of America, ex rel. Charles Carpy, W. A. T. Agard, F. H. Stewart, and Dotte S. McGilvray, executrix of the last will and testament of Eldora Brown, deceased, doing business under the firm name and style of Tedoc Company is Relator and Hubert Work, Secretary of the Interior, is Respondent, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 3rd day of September, 1925.

[Seal of the Supreme Court of the District of Columbia.]

MORGAN H. BEACH,  
*Clerk.*

EW.

Endorsed on cover: District of Columbia Supreme Court. No. 4367. United States of America ex rel. Charles Carpy et al., appellants, vs. Hubert Work, Secretary of the Interior. Court of Appeals, District of Columbia. Filed Sep. 3, 1925. Henry W. Hodges, clerk.





COURT OF APPEALS  
DISTRICT OF COLUMBIA  
FILED

OCT 19 1925

*Henry M. Hodges*  
CLERK.

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# Court of Appeals of the District of Columbia

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OCTOBER TERM, 1925.

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No. 4367.

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No. 21. SPECIAL CALENDAR.

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UNITED STATES OF AMERICA, EX REL.  
CHARLES CARPY, ET AL.,  
*Appellants,*

vs.

HUBERT WORK, SECRETARY OF THE INTERIOR,  
*Appellee.*

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## APPELLANTS OPENING BRIEF.

F. E. SCOTT,  
*Attorney for Appellant.*

Munsey Building, Washington, D. C.

A. H. JARMAN,  
*Of Counsel.*





## Prologue.

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On an afternoon in July, 1919, an alleged engineer called at the office of Tedoc Company, in San Francisco, and demanded money for "expenses," to wit: a trip to appellant's mines.

Mr. Agard promptly phoned counsel and advised him of the demand, and, in turn, was advised to throw this alleged engineer out of the office. This was done, and he departed abruptly and in anger.

These facts were immediately reported to the Secretary's representative in California; protest was made that such a man should be permitted to examine any property in California, and it was requested that some other engineer be sent to report on appellant's property.

Appellant was assured that another engineer would make the examination. Unfortunately, the Secretary's representative was swamped with work and, unintentionally, overlooked the matter.

Appellant and its counsel relied implicitly upon his assurances and dismissed the matter from further thought.

When, however, the first decision of the Commission was announced, it was evident to those familiar with the facts, that something was wrong somewhere, and it was not until the latter part of 1920 that Tedoc Company learned that the report on its properties and operations had been made to the Commission by this alleged engineer and bribe seeker.

This report, which influenced the Commission in its first decision and prejudiced it against appellant, is now of no further moment in these proceedings, as it has been proved to be false in every material statement, and the Secretary of the Interior, after many hearings and many arguments, has gradually backed away from one errone-



ous position after another, all caused by the false report, until, now, but two questions remain.

We direct attention to this report because it is the basis of the second question, to wit: the contract of May 10, 1917.

Whilst appellant knew that its property had been reported upon by this alleged engineer, it was neither permitted to see the report nor to have a copy of it until some years later; hence, for a considerable period of time, appellant and its counsel worked in the dark. When, however, appellant was permitted to read this alleged report, the Secretary of the Interior was promptly apprised of the foregoing facts, and they stand uncontradicted in this record.

# Court of Appeals of the District of Columbia

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OCTOBER TERM, 1925.

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No. 4367.

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No. 21. SPECIAL CALENDAR.

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UNITED STATES OF AMERICA, EX REL.

CHARLES CARPY, ET AL.,

*Appellants,*

*vs.*

HUBERT WORK, SECRETARY OF THE  
INTERIOR,

*Appellee.*

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## APPELLANT'S OPENING BRIEF.

Appellant's claim for losses, under the War Minerals Relief Act, was denied because the Act "*contemplates reimbursement for losses due to Government interference only,*" and that, upon the facts established in the claim, appellant's losses resulted from "*his (its) own uninfluenced act,*" (the contract of May 10, 1917); therefore,



Dr. Diller's request "*created no Government obligation for losses.*"

There are two questions involved in this appeal:

1. Published stimulation, under the amendment of 1921;
2. The sales contract of May 10, 1917.

Before they can be intelligently considered, it is necessary that this court have an understanding of the facts upon which the claim is based.

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### **The Facts.**

In April, 1917, Mr. W. A. T. Agard and Mr. F. H. Stewart were co-partners, engaged in the business of buying and selling ores on a commission basis.

On or about April 13, 1917, one C. H. Philpot came to San Francisco and directed Mr. Agard's attention to a chrome property in Tehama County, California, located on what is known as Tedoc Mountain. Philpot represented that the property could be acquired for a nominal sum, to wit: \$5,250, and that it could be operated cheaply and at a profit. Philpot stated that a road, *costing not to exceed \$3,500, and approximately five miles in length, would have to be built*; that this road would be practically level; that three miles was practically constructed by nature and would require but little work; that it could be completed and the property acquired and placed on a producing basis by *June 15, 1917, for \$8,750.*

Mr. Agard then sought to interest his friends, Mr. Charles Carpy and Mr. James Brown, with the result that a supposedly competent and reliable mining engineer by the name of Bacon was employed and sent to the property to investigate and report.

Bacon went to the mine with Philpot, made an examination and, on *April 18, 1917* submitted his written report.

p. 7, f. 11.

His report was favorable and confirmed Philpot's representations. This report and the published appeal of President Wilson in the "Mining and Scientific Press," *April 21, 1917*, enabled Mr. Agard to persuade Mr. Carpy and Mr. Brown to finance the proposed operations *to the extent of \$8,750*.

Thereupon, and on or about *April 23, 1917*, Tedoc Company was organized and the Tedoc Mountain property acquired.

Operations began *May 3, 1917*, with Philpot as superintendent.

*On May 10, 1917, appellant entered into a contract in writing with California Chrome Company, whereby it agreed to sell to said Company all chrome to be (and if) produced from Tedoc Mountain, up to 4,000 tons, at 60 cents per unit, which, at that time and for the grade of ore produced from said property, was \$27 per ton, or \$4 per ton in excess of the prevailing market price in California.*

*On May 31, 1917, appellant purchased the second group of claims.*

*On or about June 15, 1917, Philpot advised appellant by letter that all funds provided for road construction and operations had been expended, that the road was not completed and that more funds must be provided.*

Mr. Agard conferred with Mr. Carpy and Mr. Brown, and submitted Philpot's letter, with the result that Mr. Agard was sent to the mine to investigate.

Mr. Agard went to the mine with Mr. J. R. Van Fleet, engineer of the California Chrome Company, and reached



there on *June 22, 1917*, and, then and there, and for the first time, discovered that both Philpot and Bacon had fraudulently misrepresented conditions as to the road which it was necessary to build in order to get the ore out.

To this date, *June 22, 1917*, no member of appellant Company had ever seen the property; all had relied upon the reports by Philpot and Bacon who, to that time, had enjoyed the full confidence of all.

Mr. Agard found all funds expended, some debts incurred, about three miles of road partially completed and that, instead of a five or six-mile road comparatively level, it would require a road approximately eleven miles long, over steep, rugged mountains to an elevation of over 4,000 feet, at a cost of \$30,000, instead of \$3,500.

Mr. Agard returned to San Francisco, and reported to his associates. After due consideration, appellant decided to quit business and sell the mine. *It directed Mr. Agard to go to the property, discharge all employees, pay all debts and sell.*

Because of an article appearing in the San Francisco "Examiner," *June 22, 1917*, to the effect that Dr. Diller was in California encouraging the increased production of chrome ore for war purposes, Mr. Agard's departure was deferred, pending an attempt to get in touch with him. Not being successful, appellant again directed Mr. Agard to wind up the business, and he again started for the mine.

In the meantime, Dr. Diller heard of Tedoc operations and, on *July 10, 1917*, visited said property. *His visit was unknown to and was not at appellant's invitation.* He talked with appellant's mine foreman and with Mr. C. M. Burleson, an engineer in charge of a nearby mine who was visiting appellant's property at the time.

*Dr. Diller went over the road thus far completed. He walked over the route to be completed. He saw, knew and appreciated the difficulties then confronting appellant respecting road completion. He examined the ore bodies and, after doing so, then and there, urged strongly that appellant complete the road and get out the ore, as the Government needed same for war purposes.*

On or about July 10 or 11, 1917, Mr. Agard, at Red Bluff en route to the mine, received a telephone message from Mr. Hart, the mine foreman, advising him of Dr. Diller's visit and request, etc.

Acting on his own judgment, Mr. Agard immediately returned to San Francisco and reported to Mr. Carpy and Mr. Brown that Dr. Diller, representing the Department of the Interior, had examined the mine and requested appellant to complete the road and get out the ore as quickly as possible, as the Government needed it for war purposes, which report was soon thereafter confirmed by letter from Mr. Burleson.

Appellant then sent Mr. Burleson to the property, in order to confirm Mr. Agard's judgment as to the cost of road completion. Mr. Burleson reported that, in his opinion, it would approximate \$30,000.

After giving full consideration to Dr. Diller's request, and solely and only because of said request and not otherwise, *on or about July 21, 1917*, appellant abandoned its determination to quit and decided to complete the road and get out the ore and, then and there, changed the plan and scope of its operations.

Mr. Agard immediately returned to the mine, arriving *July 23, 1917*. He discharged Philpot, made Hart superintendent, ordered intensive operations and the employment of every available man, with the result that said road was completed so as to permit of hauling in the



latter part of September, 1917, and, before being compelled to close because of winter conditions, appellant had produced over 500 tons of high grade chrome ore for the use of the nation at war.

The cost of said road, when completed to permit of hauling, was \$28,986.80,—a difference of \$23,986.80 over and above the price originally contemplated.

*The first and only time that Dr. Diller ever met or conversed with any member of Tedoc Company was on July 5, 1918, when he met Mr. Agard at Red Bluff.*

Respecting appellant's operations and its efforts to produce chrome, as aforesaid, Dr. Diller reported to the Secretary of the Interior as follows, to wit:

"\* \* \* As I was in the field at that time for the U. S. G. S., stimulating the production of chrome ore to supply the needs of the country, I strongly encouraged Mr. Hart, July 10, 1917, in the presence of his wife, to continue his work and develop his producing mine \* \* \* and his statement concerning our conversation is correct.

"On July 6, 1918, I visited the Tedoc mine a second time, where I again met Mr. J. H. Hart, and strongly urged him to do his utmost in getting chromite to save the country.

"Mr. J. H. Hart and W. A. T. Agard, of the Tedoc Company, from the beginning have acted in good faith and with all the stimulation my spoken words could supply.

"The Tedoc Company did all it could to produce the chromite needed to win the war."

From the uncontradicted evidence, the following deductions must be made:

1. That appellant was deceived by the false and fraudulent reports made by Philpot and Bacon as to the

length and cost of the road and the time required for its completion;

2. That the scope of intended operations, prior to the discovery of this fraud, approximated \$8,750 and no more;

3. That, on discovery of the fraud, appellant determined to quit and sell;

4. That appellant completed the road because of Dr. Diller's request;

5. That appellant's ore contract with California Chrome Company, at that time, *May 10, 1917*, was \$4 per ton in excess of the open market price;

6. That at the time of Dr. Diller's request, *July 10, 1917*, said contract price was still in excess of the market price and, while Dr. Diller did not then know of said contract, *he did know the prevailing market price for such ore in California.*

7. That Dr. Diller's request was made with full knowledge of all mining conditions; that he was at the mine and examined the ore bodies; that he travelled over the road to be constructed and knew the length and character of road necessary to be constructed in order to get out the ore; that his research was conducted in the light of existing conditions, consequently, he knew the costs of production.

8. The record discloses that appellant's mining operations and its sales to said California Chrome Company, under the terms of said contract, *resulted in an operating profit of \$13,443.59*; therefore, appellant's losses resulted from the increased cost of road construction and the purchase of the property.



9. That, in addition to the extra expense for road construction, appellant suffered other losses from causes not contemplated when it began business,—

(a) Delay of four months in producing. Had the road been completed as originally contemplated, ore shipments could and would have commenced in June, 1917, and a larger volume of business would have been done in that year at less cost.

(b) Greatly increased hauling charges and a longer haul. Over the Philpot road, twice as much ore could have been hauled each 24 hours as was hauled over the longer road. Furthermore, the trucks had to climb back up the mountain more than four thousand feet higher than Philpot and Bacon had originally reported, necessitating a heavy cost in oil, gas, wear and tear on the trucks,—all of which had to be borne by appellant.

(c) A very heavy road upkeep not contemplated in the beginning.

10. That, had the original road reports been truthful and the road completed at a cost of \$3,500, and hauling commenced by *June 15, 1917*, a much larger tonnage of ore could and would have been produced and shipped in 1917 at far less cost.

11. From the business done, the record conclusively establishes that, but for the extra road cost, appellant's operations on Tedoc Mountain were at a profit and, had there been no such extraordinary road cost, appellant would have made a profit, even under the California Chrome contract, and there would have been no claim for losses under the Relief Act.

12. That, after Dr. Diller's request, appellant not only changed the scope of operations to which it had com-

mitted itself prior to the discovery of the fraud, but increased operations by acquiring and operating other properties, which also caused losses.

\* \* \* \* \*

For a full understanding of the questions involved, it is necessary to direct attention to the fact that, under the Act of March 2, 1919, the Secretary had ruled that only direct or personal request or demand was stimulation within the Act, and that indirect or published stimulation was not sufficient to justify an award.

The first direct personal request to appellant was that made by Dr. Diller on *July 10, 1917*,—*one of the first direct personal requests made by the Government.*

Though appellant established indirect or published request, in its verified questionnaire, and endeavoured to prove same at the first hearing before the Commission, same was not recognized.

As the administration under the original Act progressed, great dissatisfaction arose about the narrowness and restrictiveness of this stimulation rule. Some 605 claimants were denied redress, because they were not directly or personally requested to produce for the Government's use.

Congress again acted and, on *November 23, 1921*, passed the first amendment which recognizes indirect or published stimulation as sufficient to justify an award.

After its passage, it was not known what published requests would be sufficient "stimulation" under its terms, and it was not until April, 1923, that appellant discovered that the Secretary recognized and was adjusting claims on President Wilson's "Appeal to the Miner," which was first published on or about *April 16, 1917*.



Appellant's business was conducted by Mr. Agard, as he was the only one of the four associates who had any knowledge or experience in mining and even his experience was limited. He was the only associate who knew all the facts.

In 1922 and until the first part of January, 1924, Mr. Agard, then past 70 years of age, was seriously ill and was mentally and physically unable to give any attention to any business of any kind.

At the time of discovery that President Wilson's message was recognized as "stimulation," Mr. Agard was in the hospital at Oakland, California, undergoing a capital operation, and it was impossible for counsel to obtain any proof from him.

These facts were related to Assistant Secretary Finney, and he very courteously and considerately granted extensions in which to obtain the necessary proof, and it was not until *January 4, 1924*, that counsel was able to obtain Mr. Agard's affidavit respecting the disputed matters in appellant's claim and, particularly, in reference to published stimulation as of *April 21, 1917*.

As we have stated, there are but two questions involved in this appeal.

If the first question is decided in appellant's favor, then the second question becomes immaterial, as stimulation will then have been established prior to the making of said contract of May 10, 1917.

If the first question is decided adversely to appellant, then the second question becomes important, as the only way to defeat an adjustment and award to appellant will be for this court to hold, as a matter of law, that said contract of May 10, 1917, was and is a firm contract, committing appellant, in any event, to the operations resulting in the losses claimed.

### Published Stimulation.

In appellant's questionnaire, filed with the Secretary, published stimulation was claimed, but, for reasons stated, was denied.

At the hearing before the Commission in July, 1919, appellant endeavoured to prove published stimulation, but was prevented from doing so because the Commission held such proof to be irrelevant.

Whilst appellant and its counsel have always considered the direct personal request made by Dr. Diller on July 10, 1917, as more than sufficient to entitle it to an adjustment of its claim, we are equally convinced that a just and equal administration under the law demands that said claim be adjusted under published stimulation as of *April 21, 1917*.

The proof shows that the associates of appellant Company first heard of Tedoc Mountain property on or about *April 13, 1917*.

They employed an engineer to examine and report on the property, which report was submitted on *April 18, 1917*.

Whilst Mr. Carpy and Mr. Brown (the men who financed appellant), were considering the proposition,—no conclusion having been arrived at, no obligations incurred,—there was published, in *The Mining and Scientific Press*, in San Francisco, the "Appeal of President Wilson to the Miners." Mr. Agard was a subscriber and reader of this journal. He read President Wilson's appeal and then directed attention to it.

Mr. Agard's affidavit, corroborated by other affidavits, states:—

"Affiant read said message and considered same  
\* \* \* and, because thereof, urged said Carpy and



Brown to go ahead with the enterprise, as it was evident that chrome would be in demand because of war conditions, and that mining of war minerals was being encouraged by the Government. And, after directing attention to the said message, and after consideration of the report made by said Bacon, said Carpy and Brown agreed to go ahead and finance claimant to the extent appearing in the written agreement thereafter executed dated June 29, 1917, a copy of which is attached to the claim filed herein."

p. 46, f. 76.

After reading this appeal, appellant exercised its option and took over the Tedoc Mountain property. *This was the first definite commitment by appellant. Up to this time, appellant was not obligated in any way.*

Appellant assumed obligations and began operations after publication of President Wilson's appeal.

Thus, it is established, without conflict, that the President's appeal was an important and deciding factor in appellant's operations, and brings this claim squarely within the proof of other claims which have been adjusted by respondent.

Published stimulation, as of April 21, 1917, was denied because said published stimulation did not:

"cause or produce any change in claimant's plans or purposes, or cause or occasion any expenditures that would not otherwise have been made \* \* \*."

Waiving, for the moment, the fact that the record affirmatively establishes, without contradiction, that appellant relied upon President Wilson's appeal, before obligating itself to undertake the production of chrome ore, we come to another situation which destroys respondent's alleged reason, to wit: *that respondent and his predecessors made awards to other claimants on the identical*

*proof submitted by appellant; hence, appellant has been subjected to—*

*“the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.”*

*Bank of Columbia vs. Okey; 4 Wheat., 244.*

In the claim of Salt Lake Tungstania Mines Company, No. 647, an award was made in the sum of \$19,859.55, upon proof of the reading of President Wilson's appeal. The award in that claim reads:—

*“Claimant was operating a tungsten property at the outbreak of the war \* \* \*.*

*“In the Spring of 1917, the price of ore had slumped and the stockholders were discouraged and inclined to quit, when the President issued his appeal to miners. This, it is urged, caused them to continue when otherwise they would have stopped. The date of such interference was April 21, 1917. It is not shown that they increased their efforts; they simply continued \* \* \*.”*

In the claim of John A. Jensen, No. 440, an award was made upon the same stimulation. In this claim, it was asserted that claimant had ceased operations on April 6, 1917, but that, in response to President Wilson's appeal, they took another lease and continued mining.

An award was made to C. H. Craig, in claim No. 1074. Respondent's decision states that this claimant operated before the war but, because of debts and because his son was about to enter the army, he intended to cease his operations in March, 1917, and (it is alleged) had done so when, a few weeks later, he read the appeal of President Wilson to the miner and, acting upon that appeal, renewed his former lease and continued operations.



The affidavit of Mr. Craig, upon which published stimulation was granted, reads as follows:—

*“That, early in 1917, he had decided to abandon the underground workings of the mine, make a cleanup of the surface and retire from tungsten mining, because of debts incurred in the industry.*

*“That, on Monday, April 16, 1917, President Wilson’s appeal to produce tungsten and other war minerals \* \* \* came to the attention of the deponent.*

*“\* \* \* and that, because of the appeals and solicitations, and because of patriotic fervor, and because of a sense of duty to aid in the war then being waged, this deponent continued to mine and produce tungsten ores.”*

In the claim of Thomas G. McGrath, trustee, No. 605, published stimulation of President Wilson’s appeal was allowed upon the following proof:—

*“That, in April, 1917, \* \* \* was an appeal over the signature of the President of the United States, enlisting the miners in the great service army. \* \* \* Claimant saw and read the article in its entirety \* \* \* and was very much impressed by the appeal of the President, \* \* \*.*

*“Claimant, thereupon, and in response to this appeal, enlisted the aid of his associates, \* \* \* secured a lease \* \* \* and commenced operations on May 1, 1917.”*

The recommendation of the Commissioner for an award upon this proof reads as follows, viz:—

*“Claimants have now filed a motion for re-hearing, under the amendment, in which they have made a sufficient showing of stimulation through publication, prior to the date of beginning operations.”*

In the claim of Harry V. Norton, No. 561, the affidavit upon which respondent granted an adjustment and an award reads as follows:

“\* \* \* that, while it is true \* \* \* that this affiant did not start leasing operations in response to any request or demand of the Government, in any way, shape or form, \* \* \* the price of tungsten fell to a point which was below the cost of production; that, notwithstanding this fact, this affiant continued operations on his said lease, by virtue of the stimulation contained in President Wilson’s message to the miners \* \* \* that, although the price of tungsten had slumped to a point which rendered the further operation of his said tungsten lease unprofitable, \* \* \* and, *had it not been for the urgent demand of the United States \* \* \* made by the President of the United States, in April, 1917, this affiant would have suspended operations and gone to work at day’s pay \* \* \**”

The instances referred to in the petition are but a few of a great number to similar effect.

If an award was justified to the Salt Lake Tungstonia Mines Company because of the President’s appeal, surely an award should be made to appellant on the identical proof; surely appellant is as much entitled to published stimulation, by virtue of President Wilson’s appeal, as were Craig, McGrath and Norton.

The petition alleges that the Secretary of the Interior has adjusted and paid to many claimants losses suffered by reason of producing said minerals in compliance with said published request of President Wilson, and has denied the same relief to appellant upon identical proof and that, by reason thereof, said Act has not been uniformly and fairly administered by respondent and, because thereof, appellant has been unjustly and unrea-



sonably and unlawfully discriminated against, and respondent's denial of and refusal to adjust appellant's claim, upon said published request, is, therefore, an unequal, arbitrary and discriminatory administration of the law, and denies to appellant the equal protection and security of the laws of the United States, contrary to the provisions of the due process clause of the fifth amendment of the Constitution.

The uncontradicted proof submitted by appellant in respect to published stimulation is, in all respects, equal to the proofs in the claims referred to upon which awards have been made.

Respondent's decision in denying published stimulation as of April 21, 1917, is, therefore, arbitrary and capricious, as his ruling is not only contrary to, but finds no support in the evidence.

*The conclusions of an administrative officer, entrusted with the administration of an Act of Congress, must be fairly arrived at and have substantial evidence to support them; otherwise, they are arbitrary and capricious and subject to review and correction by the courts.*

*Ripley vs. U. S., 223 U. S., 695;  
Minn. vs. Lane, 247 U. S., 243;  
Houston vs. St. Louis, 249 U. S.;  
Broughton vs. Blanton, 249 U. S., 721;  
Kwock Jan Fat vs. White, 253 U. S., 450;  
Leach vs. Carlisle, 258 U. S., 128.*

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### **The Sales Contract of May 10th, 1917.**

The important facts to be remembered in the discussion of this proposition are:

Appellant acquired Tedoc Mountain property on *April 23, 1917;*

Operations commenced *May 3, 1917*;

*On May 10, 1917, claimant made a contract with California Chrome Co. for the sale of four thousand tons of ore, if produced, at a price then \$4 per ton in excess of the open market price for similar ore; that this contract price was still in excess of the open market price on July 10, 1917, and July 23, 1917;*

That appellant acquired its properties, began operations and entered into the sales contract solely upon reports made to it by two engineers, Philpot and Bacon, who reported that it would be necessary for appellant to build a road approximately five miles in length, costing \$3,500, and that \$8,750 would be sufficient capital to acquire the property, complete the road and begin ore shipment by *June 15, 1917*.

In respect to the road, these reports were false.

On *June 22, 1917*, appellant discovered the fraud. Appellant then learned that, instead of a \$3,500 road and a five-mile haul, it would be necessary to build a \$30,000 road with an eleven-mile haul. Appellant determined to quit and was about to quit when Dr. Diller, of the U. S. G. S., without invitation and unknown to appellant, visited its property and requested appellant to complete the road and get out the ore, in order to help the Government win the war.

Dr. Diller's request caused appellant to abandon its determination to quit and, solely and only because of said request, appellant continued operations, completed the road and produced nearly 1,500 tons of high grade chrome ore.

Direct personal request by Dr. Diller is conceded as of July 10, 1917, and it is likewise conceded that appellant acted in the utmost good faith and did everything in its power to produce chrome for the use of the nation at war.



*Appellant's claim was denied because of the alleged legal effect of said contract. In other words, conceding that appellant had been deceived and had entered into said contract because of such deceit (not by California Chrome Company), yet, as a matter of law, and regardless of intent respecting the scope of operations (road-building) in which it purposed to engage when it began operations, appellant was bound to execute the contract, no matter how burdensome.*

Respondent's position is clearly stated, to wit:

*"Claimant had, prior to stimulation (July 10, 1917), assumed an obligation with respect to the chrome ore existing in the Tedoc property, which, however burdensome, it had no alternative but to fulfil. It was not privileged to abandon the undertaking without the consent of the Cal. Chrome Co."*

*"The Govt. was urging increased production, but always there was present the element of profit for the operator; and if, as in this case, there existed a contract which was an insurmountable handicap, the loss due to it should not be taken from the shoulders of those alone responsible for it and put upon the Govt., simply because the mining of chrome was urged by the Govt. during the war \* \* \*."*

*"The Act contemplates reimbursement for losses due to Govt. interference only \* \* \* in this case, claimant, who made a contract prior to contract with Diller, must bear the responsibility of his own uninfluenced act \* \* \*. The claim is denied."*

p. 76, f. 124.

If the said contract of May 10, 1917, is a firm contract and, in reality, obligated appellant to fulfil regardless of Dr. Diller's request, and prevented it from quitting operations as intended, then, there would be no escape from respondent's conclusion; *but the fallacy of his conclusion*

*is that the said contract is not and never was intended to be a firm contract obligating appellant to fulfil in any event.*

That this court may understand our position, we repeat:

Our position has always been and still is that, when appellant discovered the fraud of Philpot and Bacon, it determined to quit and sell, whether at a profit or at a loss. Appellant's determination to quit and sell is conclusively established by the testimony in the record, and there is no evidence to the contrary, and, what is more important, *the record establishes without contradiction that it could have quit and sold in July, 1917, and retired without loss.*

Why, then, did appellant not quit and sell in July, 1917?

It did not quit and sell because Dr. Diller visited appellant's property on July 10, 1917, made a thorough examination and, *with full understanding of what was necessary to be done and full understanding of existing market conditions, personally requested appellant to go ahead, complete the road and get the ore out, in order to help the Government win the war.*

If no other feature had been interjected, it is clear that an award would have been made (Salt Lake Tungstonia Mines Co., No. 647), but such feature is interjected and that feature is the contract of May 10, 1917, and, solely because of it, the claim has been denied.

All other conditions required by the Act have been established and are conceded.

*The contract of May 10, 1917, is the bone of contention.*

Proper interpretation of this contract is, therefore, determinative of appellant's right to an adjustment of its said claim, under stimulation as of July 10, 1917.



If respondent's interpretation of this contract, to wit:

"that, no matter how burdensome the contract may have proved, from whatever cause, claimant had no alternative but to fulfil,"—

is correct, we concede that his decision is sound.

The contract is simple in form, and is expressed in a letter from California Chrome Company to appellant. It is completed by acceptance on its face.

The pertinent parts of the contract, relevant to this discussion, are:

"Please ship during 1917 \* \* \* 4,000 tons of chrome ore averaging 40% and above \* \* \* price to be 60 cents per unit \* \* \*."

"\* \* \* It is understood and agreed that this chrome ore is to be produced from the Tedoc Mountain deposit and that, before the expiration of this order, we have the option of purchasing, during 1918, upon the same terms and conditions as herein contained, any unfilled portion of this order.

"\* \* \* *It is also agreed that any transfer of ownership shall be made subject to this order.* This order shall be considered as filled, should the Tedoc Mountain deposit become exhausted before 4,000 tons have been produced.

"This order does not extend beyond January 1, 1918 \* \* \*."

Before entering upon a discussion of this question, we direct attention to the fact,—and we trust that the court will particularly note this fact and bear it in mind throughout,—to wit: that, on July 10, 1917, this contract was wholly executory. Nothing had been done under it,—no advantage had nor any prejudice suffered,—hence, no executed consideration. This fact is of importance, in

that it is a distinguishing feature that differentiates the cases cited by respondent as sustaining his decision.

\* \* \* \* \*

It is an elementary rule in the interpretation of contracts that the intention of the parties is to be ascertained from the contract as a whole; as often expressed, "within its four corners."

Civil Code, Cal., Sec. 1641.

Respondent interprets this contract as obligating appellant to fulfil in any event; yet the contract itself expressly reserves to appellant the right to sell at any time, "*subject to this order.*"

Appellant would have been relieved of liability by sale, "*subject to this order.*" Such a sale would, *ipso facto*, have relieved it of any obligation to operate. The contract itself expressly reserves to appellant an alternative right, regardless of any other contention, which repudiates the alleged interpretation by respondent.

It was this alternative right that appellant was about to exercise when the Government interfered with its plans. It was this interference that caused appellant to surrender or abandon this right. It is evident, therefore, if the contract be interpreted in its entirety, as the law requires, that appellant was *not* obligated to fulfil in any event. The contract provides an express alternative which, had it been exercised, would have relieved appellant from any obligation to deliver.

Inasmuch as the Government induced appellant to abandon this alternative right, every principle of equity jurisprudence now estop the Government from asserting any right, or taking any advantage, resulting from



its wrongful acts. It ought not now to be permitted to question appellant's determination to quit in July, 1917. Because of Dr. Diller's request, appellant was induced to abandon an unquestioned legal right granted to it by the contract which, had it been exercised, would have saved appellant from loss, and what is more important is the fact, established in this record without contradiction, that appellant could have sold its property in July, 1917, at a profit. Being so, it follows that the losses claimed resulted by reason of Government interference with its business, and justice and equity require that its losses be now adjusted, under the Relief Act.

\* \* \* \* \*

The obligations created by any contract are only such as the parties intended at the time.

One way of determining the effect of this contract is to assume, for the purposes of the argument, the state of facts which appellant asserts would have existed had it not been for Dr. Diller's request, to wit: *a cessation of operations in July, 1917.*

Assuming a cessation of operations—a refusal to operate during 1917 and 1918—objection by California Chrome Company with claim for breach of contract and an assertion that appellant was obligated to operate and deliver in any event; for all the purposes of this test, we will assume that California Chrome Company would have taken the same position as respondent now takes.

In this situation, if California Chrome Company had then endeavoured to assert and enforce its alleged rights, it could have done either of two things, viz:—

1. Commence an action for damages;
2. File a bill in equity to compel specific performance.

The second remedy (specific performance), could not possibly have been maintained, and judgment would have been entered in favor of Tedoc Co. on demurrer.

The legal principles involved are so elementary and so well established, and the contract so indefinite, that it may be dismissed with a quotation from one of the standard works on the law of contracts:—

“In order to be the basis of a decree of specific performance in equity, the contract must be so certain that the Chancellor’s decree can specify exactly what must be done, in order to comply therewith.”

Page on Contracts, sec. 106.

*McGee vs. McGee*, 174 Cal., 276; 162 Pac., 1023.

Furthermore, the contract could not have been specifically enforced in the courts of California, because the conceded facts would have established beyond question that appellant would not have received *an adequate consideration* for ore produced over a road eleven miles in length, costing \$30,000, whereas the contract price was fixed in the belief that the road was to be five miles in length and to cost \$3,500. Under such facts, the contract price would be unfair and unjust, and certain to result in a large loss, if specifically enforced.

One of the latest decisions of the Supreme Court of California holds:—

“Must show that the defendant received an adequate consideration.”

*Koblick vs. Larson*, 64 Cal. Dec., 3; 207 Pac., 929.

In *Baker vs. Miller*, 38 Cal. App., 471, the court held:—

“A contract cannot be specifically performed unless the complaint shows affirmatively that the contract



sued upon is fair and just to the party against whom it is sought to be enforced."

The unfairness and the inadequacy of the contract price, under actual conditions, was recognized and respected by the Cal. Chrome Co., when after discovery of the road fraud and because thereof, *it voluntarily increased the price for the ore nearly \$20 per ton.*

Still another reason would prevent specific performance, and that is, the nature and character of the contract made,—its lack of certainty in many respects, and, particularly, because fulfilment would have required protracted supervision and direction.

In the case of *Poultry Produce Co. vs. Barlow*, 64 Cal. Dec., 71; 208 Pac., 93, the court held:—

"Courts of equity will not decree the specific performance of contracts which, by their terms, stipulate for a succession of acts whose performance cannot be consummated by one transaction, but were to be continuous and require protracted supervision and direction."

Thus, under the law of the State where the contract was made and was to be performed, it is clear that this contract could not have been specifically enforced.

\* \* \* \* \*

The only possible remedy was an action for damages.

Assuming, then, a refusal to operate, an action for damages, issue joined and a trial.

Cal. Chrome Co. could only have proved an executory contract, a refusal by appellant to operate and produce and, possibly, an explanation by reference to the circumstances under which the contract was made and the matter to which it relates. This explanation of circum-

stances would have been but the facts that we have repeatedly recited. Conceding all the facts and circumstances before the court, the right to a judgment for damages could then have been determined on motion for non-suit or directed verdict.

Such motion would have been based on the following grounds, viz:—

1. That the contract was executory;
2. That the terms of the contract are so indefinite and uncertain, respecting the nature, or scope, of operations intended, that the court could not have ascertained and determined what performance was required.
3. Conceding a breach: that the contract is so indefinite and uncertain, in respect to the deliveries to be made, as to time and quantity, that the court could not have ascertained, with the degree of certainty that the law requires, the damages that should be assessed,—that the sum arrived at would necessarily be conjectural; therefore, no more than nominal damages could have been awarded, in any event.

The law upon this point is settled in the State of California.

In *Nightingale vs. Scannell*, 18 Cal., 315, the court held:—

“Damages may sometimes be recovered on account of loss of anticipated profits, but *only when there are proper data for its calculation.*”

Stated conversely:

“Where, from the nature of the contract, it is not practicable to ascertain the amount of damages sustained by breach of contract, the measure is the price agreed on.”

*Coffee vs. Meiggs*, 9 Cal., 363.



No price was agreed upon as liquidated damages; hence, the Nightingale case is in point.

The law of Cal. is clearly stated in Vol. 17, C. J., p. 725, sec. 61, as follows:—

“Where it is shown that plaintiff has suffered damages, but, from the nature of the case, they cannot be shown with reasonable certainty, only nominal damages are recoverable. So, if by reason of the uncertainty of the terms of the contract, the legal right of which plaintiff has been deprived by breach is indefinite and incapable of ascertainment, nominal damages only can be recovered.”

In support of this motion, the court's attention would have been directed to the statutory law of the State of California, respecting contracts, and the interpretation thereof.

The following provisions of the Civil Code were and are relevant and would have been considered and applied, in disposing of the motion:—

“A contract must be so interpreted as to give effect to the *mutual intention of the parties*, as it existed at the time of contracting \* \* \*.”

Sec. 1636.

“The language of a contract is to govern its interpretation, if the language is clear and explicit and does not involve an absurdity.”

Sec. 1638.

“The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.”

Sec. 1641.

“A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates.”

Sec. 1647.

“*However broad* may be the terms of a contract,

*it extends only to those things concerning which it appears that the parties intended to contract."*

Sec. 1648.

*"In cases of uncertainty \* \* \* the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist \* \* \*."*

Sec. 1654.

*"No damages can be recovered for a breach of contracts which are not clearly ascertainable in both their nature and origin."*

Sec. 3301.

Intelligent consideration of the argument to follow requires a knowledge of the decisions of the Supreme Court of California—respecting certainty in contracts—for which reason we quote:—

*"An express contract need not be in writing, but, whether oral or written, there must be certainty and exactness as to the language or words used in expressing the terms of the contract and in showing a meeting of the minds of the parties as to the terms.*

*"It is settled that no action will lie to enforce the performance of a contract, or to recover damages for its breach unless it be complete and certain; and the rule applies as well to price as to subject matter and parties.*

*"It has been said that there is nothing of more importance than that the ordinary contracts between man and man, which are so necessary in their intercourse with each other, should be certain and fixed, and that it should certainly be known when a man is bound and when he is not. A contract sought to be enforced must, at all events, be so certain that its meaning can be ascertained. An indefinite contract cannot be enforced because the courts cannot know to what the parties agreed. A meaning and intent of the parties must be placed beyond the bounds of mere conjecture."*

Cal. Juris., Vol. 6, p. 142; Notes 12-13-14-15.



In order to determine whether cessation of operations constituted a breach of this executory contract, the court must interpret it.

The statutory law of California expressly declares that the primary object of all interpretation is to ascertain and carry out the intention of the parties.

*Burnett vs. Piercy*, 149 Cal., 178; 86 Pac., 603.

What was the intention of the parties to this contract at the time of contracting?

Can it be determined from the contract that the parties mutually understood and intended to impose an obligation on appellant to operate in any event?

Clearly not. The contract is silent respecting essential matters necessary to impose such a liability.

Conceding, for the moment, respondent's contention that appellant was compelled to operate in any event,—to what extent could it be compelled to operate ?

The contract is silent.

There is no covenant as to any minimum delivery during any given period, and there is no covenant, express or implied, as to just when delivery should commence, or, from which it could or can be determined just what appellant should do respecting delivery.

How many men should it have employed? Should it have worked three shifts per day, or only one? How many trucks should it have operated? How good a road should it have built?

The contract is silent in these respects.

And who is responsible for the absence of these covenants?

The proof establishes that the contract was entirely written by the California Chrome Company, its terms and conditions imposed by it.

If uncertain, in any particular, respecting any right now asserted by it, that uncertainty, say the Code and the Decisions of the Supreme Court of California, "*should be interpreted most strongly against the party who caused the uncertainty to exist.*"

*Payne vs. Neuval*, 155, Cal. 46; 99 Pac., 476.

Applying this rule of interpretation, the court would unhesitatingly have held that the contract did not obligate appellant to operate in any event.

If the parties intended a contract which imposed on appellant an obligation which it "had no alternative but to fulfil," it was incumbent on the party preparing the contract to see to it that the contract expressed that intention with such certainty that the court could so declare.

California Chrome Company did not provide in the contract when deliveries were to begin. It did not provide for delivery of any given quantity during any given period. *When the contract was entered into, it knew the conditions under which appellant was then laboring; it knew that appellant was then but a new enterprise with no known ore reserves,—that ore was a matter of future development and that to develop same required active mining operations:* therefore, no customary production had been established on May 10, 1917. Knowing this, it made no provision in the contract requiring appellant to make delivery of any given quantity of ore during any given period; it did not provide any penalty for failure to deliver. So far as the terms of the contract are concerned, appellant could have complied with its terms, as it saw fit.

When the contract was made, California Chrome Company knew that a road had to be built in order to deliver



the ore, yet the contract is silent as to any requirement as to when the road should be completed. It is silent as to the manner of its completion and, so far as the contract is concerned, appellant could have complied by the employment of three men, instead of 40 or 50.

*No penalties are provided in the contract and there is no provision for liquidated damages, in the event of breach.*

Inasmuch as the contract is silent respecting these matters necessary to create an obligation to deliver in any event, and that silence, creating the uncertainty, being the fault of California Chrome Company, the court would have been compelled to resolve the interpretation of the contract as not requiring delivery in any event, *but delivery only in the event appellant operated and produced from the Tedoc Mountain deposits.*

*This is the only interpretation possible.*

Such interpretation is not and would not have been inconsistent with the language of the contract, but is in complete harmony with it. Such an interpretation does not involve an absurdity, but, on the contrary, in view of the circumstances existing at the time of its making, it is the only commonsense or reasonable interpretation possible.

It would have been unreasonable,—in fact, ridiculous,—for any court to ascribe to reputable business men of experience an intention to obligate themselves by a firm contract in respect to matters in which they had no experience and which all realized that the outcome was purely a mining risk.

There is such a thing known to the law as the rule of reason. If ever a situation justified the application of this rule, surely it is here presented.

Neither courts, executives nor outsiders can make contracts for parties. Neither can read into a contract anything the parties have omitted, save, possibly, in the single instance where it can be ascertained that the omitted matter was intended to be included.

What is there in this contract or in this record that requires or permits the Government (not a party to it) to read into this contract matters that the parties themselves omitted?

It is certainly not necessary, in order to make out a valid contract, as both parties admit that a valid contract was entered into, to wit: that which the parties intended, viz:—*an agreement to deliver all ore produced by appellant so long as it operated Tedoc Mountain deposits.*

*Miss. River Logging Co. vs. Robson, 69 Fed., 773.*

This is not the case of a contract between two illiterate parties unable, because of finances or otherwise, to have prepared a contract that would correctly express the matters agreed upon. The exact contrary is the case. California Chrome Company is a subsidiary of one of the largest corporations in the United States. It had ample funds and its operations were conducted by some of the ablest business men in this country. Therefore, it had the means and the ability to have drawn a contract that would have obligated appellant in any event, had that been the intention.

There was and is no possible excuse or explanation that the California Chrome Company could have made to the court for the uncertainty of the contract. Therefore, the court would have been compelled to resolve this uncertainty against the contention of that Company. Being so, the only legal conclusion possible would have



been that *the contract was not intended* to obligate appellant to deliver in any event.

The paramount thing to be determined by the interpretation of any contract is the intent of the parties.

Section 1648 of the Civil Code states:

“However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract.”

Section 1647 of the same Code provides that, in case of uncertainty, a contract may be explained by reference to the circumstances under which it was made and the matter to which it relates.

Conceding that the court had regarded the contract as uncertain and had permitted the introduction of explanatory evidence, for the purpose of ascertaining the intention of the parties, it would have had the following facts before it:

At the time the contract was entered into, Tedoc Company had just been organized. It had no experience in mining and none in chrome mining. It had no reports from engineers as to the tonnage of ore that might be expected; no work of any kind had been done on the ore bodies; nothing had been established by custom, as in the Lee Mining Co. case: in short, the outcome was then purely a mining risk or hazard that must be assumed in every new mining venture. Furthermore, no member of Tedoc Co. had ever seen the property.

*All these facts were known to Cal. Chrome Co. at the time.*

Thus, the circumstances under which the contract was made, known to both parties, were at the time such as to negative any intent on the part of reasonable men to execute a firm contract.

It must be conceded, in the light of the facts and circumstances then existing, that the execution of a firm contract would have been nothing less than folly,—in fact, an absurdity.

\* \* \* \* \*

Supposing the action had been for damages for failure to deliver the unfilled part of the order,—a further explanation could and would have been presented that would have conclusively established the fallacy of the contention upon which the action was founded, to wit: *the acts of the parties under the contract as reflecting that which was intended.*

The Civil Code of Cal. and the Supreme Court of that State, are authority for the principle that the intention of the parties to a contract is best determined from the practical construction of the contract by the parties themselves.

Where the meaning is doubtful, the acts of the parties done under a contract afford one of the most reliable means of arriving at their intention.

The law recognizes the practical construction of a contract as the best evidence of what was intended by its provisions.

Civil Code, Sec. 3535.

“Parties to a contract have a right to place such an interpretation upon its terms as they see fit, even when such an intention is apparently contrary to the ordinary meaning of its provisions.

“It is to be assumed that they best knew what was meant by its terms and are the least liable to be mistaken as to its intention; *that each party is alert to his own interests and to insistence on his rights, and that, whatever is done by them contemporaneously*



*with the execution of the contract, is done under its terms as they understood and intended it should be.*

“‘They are,’ it has been said, ‘far less liable to have been mistaken as to the intent of their contract during the period while harmonious and practical construction reflects that intention, than they are when subsequent differences have arisen and one of them seeks a construction at variance with the practical construction they have placed upon it.’”

Cal. Juris., Vol. 6, Sec. 184.

*Mitau vs. Roddan*, 149 Cal., 1; 84 Pac., 145.

Neither party to this contract, at any time, by word or act, indicated that they understood or intended that appellant was bound to operate and deliver in any event.

The exact contrary is clearly indicated by the contemporaneous exposition of the contract by the parties themselves. Neither party regarded it as a firm contract; otherwise, they would not have acted as they did.

Appellant planned to quit, and would have quit but for Dr. Diller's request, showing clearly that it did not then regard the contract as obligating it to continue.

Appellant lived up to every legal obligation, and there is no evidence of bad faith on its part in any particular. On the contrary, the voluntary statements of reputable, disinterested men prove, beyond question, appellant's good faith.

Dr. Diller stated:

“The Tedoc Company, from the beginning, have acted in good faith and with all the stimulation my spoken words could supply.”

Mr. J. B. Huffard, vice-president and general manager of Cal. Chrome Co., and presently manager of purchases for the subsidiary companies of Union Carbide & Carbon Corporation, New York City, said:

"I am not familiar and have not entered into any discussion arising from claims made against the Govt. in connection with the production of chrome ore, but wish to say that I feel, having been thoroughly familiar with this whole situation, that the Tedoc Co. used their best efforts at all times to produce a maximum tonnage of ore. Whether their efforts were influenced by any conversation with Dr. Diller, I am unable to say, but I always did feel that the men connected with the Tedoc Co. were honorable and square."

p. 75, f. 121.

Appellant's attitude, at the time, ought to have some weight as to its understanding of its rights and obligations under the contract. Had it intended a firm contract, it certainly would not have taken the attitude it did. To have done so would have been bad faith and a breach of contract. Reputable business men do not knowingly breach their agreements.

Cal. Chrome Co. did not regard this contract as binding in any event, in the sense of obligating appellant to operate whether or not. When it learned of the fraud practised upon appellant, and of its intention to quit, Cal. Chrome Co. did not object, nor did it make any suggestion to appellant that it could not quit because of the contract, but, *on the contrary, offered to buy the property and reimburse appellant the amount expended.*

If this is not a direct admission by action at the time that Cal. Chrome Co. did not regard the contract as obligating appellant to operate in any event, then, we confess inability to judge intention by action.

Not only this, but, as work progressed and production became more difficult, and, because of higher costs, less profitable, Cal. Chrome Co., *voluntarily*, and for the sole



purpose of encouraging appellant and preventing it from ceasing operations, *increased the price for the ore nearly \$20 per ton.*

Imagine Cal. Chrome Co. voluntarily paying appellant \$20 per ton more than the contract price,—in all, more than \$15,000!

Is it reasonable to suppose that any concern would voluntarily do such a thing if it regarded the other party obligated by a firm contract to deliver in any event, especially when the record discloses that appellant was financially responsible for any breach?

The Supreme Court of Cal. says that it is to be assumed that Cal. Chrome Co. was alert to its own interests and to insistence on its rights, and that, whatever was done by it contemporaneously with the execution of the contract, was done under its terms, as it understood and intended it should be.

If we have correctly stated the law, then the voluntary action of Cal. Chrome Co., in offering to relieve appellant by purchase of its property, and by voluntarily increasing the price of the ore, must be regarded as an admission on its part that it did not understand or intend a firm contract obligating the appellant to fulfil in any event.

Thus, the interpretation of the contract by the parties themselves clearly established by their acts under it, repudiates any idea on their part, during the period of its execution, that the contract obligated, or was intended to obligate appellant to operate and deliver in any event.

In addition to this, we have the testimony of Mr. Agard, under oath, to wit:—

“\* \* \* Respecting this contract, affiant states that said contract did not obligate Tedoc Company to so operate and that neither party so understood or intended, and that said contract did not and was

not intended to obligate Tedoc Co. so as to prevent it from quitting operations at any time it so desired.

*"When said contract was entered into, it was thoroughly understood and agreed between Tedoc Co. and Cal. Chrome Co. that Tedoc Co. was only to be obligated under the contract in the event it operated Tedoc Mountain deposit, and produced chrome ore of the grade specified in the contract;— in such event, all ore produced was to be delivered to Cal. Chrome Co.*

"It was thoroughly understood and agreed at the time, and both parties so understood, that, in the event Tedoc Co. did not produce any chrome ore from Tedoc Mountain deposit, no liability would follow or attach to Tedoc Co. by reason of the contract.

"That Cal. Chrome Co. never, at any time, by word or act, indicated that it intended or understood that Tedoc Co. was obligated under this contract to fulfil in any event.

"The only obligation intended by said contract  
\* \* \* was as follows, to wit:—

*"That, so long as Tedoc Co. was engaged in producing chrome ore from Tedoc Mountain deposit, that all such ore was to be delivered to Cal. Chrome Co., under the terms of the contract, and that, if Tedoc Co. did not produce one pound of chrome ore from Tedoc Mt. deposit, no liability was incurred, under the contract, to Cal. Chrome Co."*

pp. 74, ff. 119–120.

Respecting this contract, Mr. Huffard stated:

"\* \* \* We did not feel at any time, under this contract, that the Tedoc Co. was under an obligation to the Cal. Chrome Co., provided they did not produce ore. *The obligation of the Tedoc Co., as we understood same, was that, if they did produce and deliver ore to the railroad company, it was to be sold to the Cal. Chrome Co. at the contract price.*



“\* \* \* If the Tedoc Co. had not produced a ton of ore, under their contract of May 10, 1917, the Cal. Chrome Co. would not have made any claim against them.”

p. 75, ff. 121-2.

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### **Resume.**

The contract of May 10, 1917, expressly reserves to appellant an alternative right which, had it been exercised, would have saved appellant from loss. Govt. interference caused it to surrender or abandon this right,—the abandonment of this right was the proximate cause of its losses; therefore, appellant is justly and equitably entitled to an award for losses suffered by reason of preparing to product chrome at the personal request of the Dept. of the Int.

At the time of Dr. Diller's request, said contract was executory. It was indefinite and uncertain respecting deliveries of ore—both as to time and quantity. As a matter of legal interpretation, the contract did not, on July 10, 1917, obligate Tedoc Co. to deliver in any event.

This is established by the terms of the contract itself, the circumstances at the time of its making (known to Cal. Chrome Co.), and the acts of the parties under it, all clearly indicating a contrary intention; and, last but not least, the interpretation of the contract in the light of section 1654 of the Civil Code: therefore, the contract itself was not such as prevented appellant from quitting operations and selling, and, conversely, it did not prevent compliance with Dr. Diller's request.

The only possible interpretation of this contract was the one intended and acted upon by the parties, and upon which they agreed, to wit: that announced by the U. S.

Circuit Court of Appeals, in *Miss. River Logging Co. vs. Robson*, 69 Fed., 773, to wit:

“That, by a fair interpretation of its terms, it was to continue so long as Tedoc Co. was actually engaged in producing chrome ore from the Tedoc Mountain deposit.”

As this contract did not obligate appellant to continue, whether it wished to or not, it was privileged to consider and act upon Dr. Diller's request. Having done so, brings it within the Acts of Congress and entitles it to an adjustment of its claim under the law.

\* \* \* \* \*

Six cases were cited by respondent as sustaining his contention that said contract obligated appellant to operate its property and deliver the ore in any event, however burdensome. Not a single case is applicable to the case made in this record. Every case cited was an action at law to recover damages for breach of contract *after partial performance*. Not one case involved equity principles.

This case arises under remedial legislation. The courts have repeatedly declared that such Acts should be liberally construed and equitably administered. Furthermore, the Act itself expressly enjoins the Secretary to pay such net losses as appellant “*may be justly and equitably entitled to.*”

Instead of following the injunction of Congress, relief has been denied appellant because of technical common law rules.

Even if they had application, they should not be applied or enforced if, by so doing, it would prevent the Secretary from making a just and equitable award to any claimant.



The cases cited by respondent throw no light on the question presented by this record. On the contrary, in each decision, the court is careful to distinguish the facts from those under consideration, and, *because of such distinction*, sustain the damages awarded.

The first case cited,—*Robert E. Lee Mining Co. vs. Omaha and Grant Smelter*,—illustrates the theory of the rest.

The Robt. E. Lee Mine was a noted producing mine. For some years, it had shipped its ore to the Omaha Smelter. Both concerns, at the time of the contract, were going concerns. They had done business together *and the average business and possibilities of the mine were known to both parties*.

On December 1, 1883, the Mining Company and the Smelter Company, entered into a written contract wherein and whereby the Mining Company agreed to sell to the Smelter Company "*the product of the Robert E. Lee Mine*," at a certain specified price, and *at a reduced smelter charge of one dollar per ton for a period of six months*.

The execution of the contract was begun; shipments were made and received and continued, without complaint or objection, until about February 15, 1884, at which date the Mining Company leased its mines to another, who entered into possession and thereafter controlled the mine and its output. The lessees declined or refused to deliver ores produced to the Smelter Company and sold to other parties. After the expiration of the contract period, the Smelter Company sued the Mining Company for damages, and recovered a judgment of \$8,262, *the amount of damage not being in dispute and conceded by both parties*.

The Mining Company attempted several technical defenses, among them being: "Want of mutuality;" but the court held that, *under the facts and conditions*, the promise of the Mining Company was necessarily implied and held the contract valid and binding.

This was a firm contract to sell all the output of a going mine for six months. *No reservation was made in the contract for the sale or lease of the mine by the owners, during that period*; hence, the contract impliedly obligated the Mining Company to retain ownership,—at least, to control operations for the period of the contract and to operate as was customary and reasonable for the period of the contract. The distinction between this case and the case at bar is so obvious that further comment would seem unnecessary.

Inasmuch as respondent's conclusion indicates lack of appreciation of these distinctions, we direct attention to them for his benefit.

Both companies were going concerns. They had done business together for several years. Both were familiar with the nature and character of the ore bargained for and the extent of the customary operations and output of the mine. The contract was not wholly executory. It was performed in part. It was executed for a valuable consideration flowing from the Smelter Company to the Mining Company, to wit: advantageous prices and a smelter reduction charge of \$1 per ton, which the Mining Company accepted and had the advantage of for several months, up to the time that, by its own act, it prevented full performance. There was no difficulty in ascertaining and determining the damage which the Smelter Company suffered by breach of contract.

But this case announces no rule for ascertaining or measuring the damages which the Cal. Chrome Company



suffered by reason of appellant's alleged breach of contract by cessation of operations in July, 1917. The factors necessary to determine the damage suffered were present in the Lee Mining Company case. They are not present in the supposed case against appellant. Conceding the breach, no court could ascertain or declare the damage suffered, as there is nothing by or from which same could be determined or measured.

Appellant has never questioned, and does not now question, its obligation under said contract to deliver to Cal. Chrome Company all ore produced by it from Tedoc Mountain. When appellant determined to go ahead with operations because of Dr. Diller's request, it knew that all ore produced by it must be delivered to Cal. Chrome Company. So long as appellant operated the Tedoc Mountain properties, all ore produced had to be and was delivered to said Company.

This contract is capable of no other possible interpretation. This, however, does not mean that the contract obligated appellant to operate in any event. The very fact that the contract expressly provides that appellant might sell necessarily negatives a continuous obligation to operate.

The Miss. River Logging Co. case is exactly in point, and confirms appellant's understanding of its obligations under said contract.

In that case, the court said (p. 780):—

*"We have reached the conclusion that it may be fairly inferred from the terms of the agreement and from the circumstances which led to its execution, that the purposes of the instrument intended that it should continue in force and remain operative as long as the plaintiff was actively engaged in removing the timbers from the lands which he then owned on the head waters of the river."*

The continuance of operations only would obligate appellant under the contract. A cessation of operations, therefore, created no liability, and the consent of the Cal. Chrome Company was not necessary.

Respondent's statement, therefore, that:—

“Claimant was definitely committed to mine and deliver 4000 tons of chrome ore,”—

is neither accurate, as a conclusion, nor true in fact.

In *Dittrich vs. Gobey*, 119 Cal., 599, the Supreme Court held:

“A contract in the alternative allows election to party bound to perform.”

Under said contract, appellant had not one, but two alternatives:

1. It was only obligated to deliver ore produced by it; non constat, no production; no delivery, no liability. Hence, appellant had the election of either operating and delivering, or, not operating and no deliveries. An obvious alternative election which, under the facts and conditions in this record, the Supreme Court of California says belongs to appellant.

2. Appellant had a second alternative, to wit: “*selling subject to said order.*”

Inasmuch as the record conclusively establishes that appellant would have quit except for Dr. Diller's request, it necessarily follows that the losses claimed were suffered by it solely and only because of Government interference with its business.

The record establishes that this is a just claim; that operations were carried on in the utmost good faith, and that increased production was made because of Dr.



Diller's very able and highly commendable efforts, and denial of appellant's claim is contrary to every principle of justice and equity.

\* \* \* \* \*

The right and liberty guaranteed by the 5th and 14th Amendments have been held to include the right to enter into all proper and necessary contracts, in the carrying on of trade or business.

Vol. 5, Ency., U. S. Sup. Ct. Rep., pp. 527-8.

The United States Supreme Court has often approved a quotation from one of its earliest decisions, to wit:

"The right of acquiring and possessing property and having it protected, is one of the natural, inherent and inalienable rights of man."

*Van Horne vs. Dorrance*, 6 Dall., 304.

Mr. Madison denounced laws impairing the obligations of a contract as among those not only violating the Constitution, but "contrary to the first principles of the social compact and to every principle of sound legislation."

*Planters' Bank vs. Sharp*, 6 How., 301.

A valid contract is property under the Constitution. It is protected against unjust legislation.

Should it not be equally protected from the arbitrary and capricious acts of an administrative officer?

We respectfully submit that an impairment of constitutional rights may as readily be effected by an erroneous or arbitrary administration of a law as by the passage of the law itself. Hence, respondent's erroneous interpreta-

tion of its legal effect is, in fact, an impairment of a valid business contract in and to which appellant had a vested right, at the time of Government interference with its business.

Appellant had just as much right, under the Constitution, to insistence upon carrying out this contract, even though it knew it would result in a loss, as it would have if it knew it would result in a profit.

There is something more to the right and liberty guaranteed by the Constitution than the mere matter of dollars and cents. A paramount right is that which the Constitution guarantees to all,—the right to enter into and carry out a fair contract in accordance with its terms. Business integrity means more to some men than dollars and cents.

Appellant carried out this contract according to its terms and its legal effect, and, because it did so, respondent has penalized it, its rights under the Relief Act.

We contend, therefore, that this contract being property within the meaning of the constitutional provisions referred to, appellant had an inalienable right to carry it out in accordance with its terms and legal effect, and that such compliance cannot, directly or indirectly, be the cause of a rejection of losses suffered thereby under a remedial Act providing for the payment of losses suffered by reason of preparing to produce at the Government's request.

\* \* \* \* \*

*In conclusion:*

It is respectfully submitted that the judgment must be reversed and the cause remanded, with directions to the lower court to issue a writ of mandamus directing



respondent to adjust appellant's claim, under published stimulation as of April 21, 1917; or, that such writ issue directing respondent to adjust appellant's claim, under direct personal stimulation as of July 10, 1917.

Either conclusion will bring practically the same result to appellant. If adjustment be directed under stimulation of July 10, 1917, then equity and good conscience demand an inclusion of appellant's losses prior thereto, as the Government appropriated same and had the use and benefit thereof, in producing the ore which was delivered for the use of the nation at war.

Respectfully submitted,

F. E. SCOTT,  
*Attorney for Appellant.*

A. H. JARMAN,  
*Of Counsel.*

Dated at Washington, D. C.,  
October 15, 1925.





COURT OF APPEALS  
DISTRICT OF COLUMBIA  
FILED

NOV 9 - 1925

*Henry M. Hodges*

CLERK

No. 436<sup>7</sup>. No. 21, Special Calendar

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**In the Court of Appeals of the District of  
Columbia**

OCTOBER TERM, 1925

October Term 1925

UNITED STATES OF AMERICA EX REL. CHARLES  
CARPY ET AL., APPELLANTS

*v.*

HUBERT WORK, SECRETARY OF THE INTERIOR  
APPELLEE

**BRIEF AND ARGUMENT FOR APPELLEE**

---

O. H. GRAVES,  
D. V. HUNTER,  
*Attorneys for Appellee.*

## INDEX

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|                 | Page |
|-----------------|------|
| The facts-----  | 1    |
| Argument-----   | 8    |
| Conclusion----- | 11   |

## CITATIONS

|                                                                                      |              |
|--------------------------------------------------------------------------------------|--------------|
| <i>Carrick v. Lamar</i> , 116 U. S. 423-----                                         | 9            |
| <i>Collins v. Johnston</i> , 237 U. S. 502-----                                      | 10           |
| <i>Ex parte Newman</i> , 14 Wall. 152-----                                           | 9            |
| <i>Heath v. Wallace</i> , 138 U. S. 573-----                                         | 10           |
| <i>Interstate Commerce Commission v. Humboldt</i> , 224 U. S. 474---                 | 9            |
| <i>Litchfield v. Register and Receiver</i> , 9 Wall. 595-----                        | 9            |
| <i>Secretary v. McGarrahan</i> , 9 Wall. 298-----                                    | 9            |
| <i>United States ex rel. Boynton v. Blaine</i> , 139 U. S. 306-----                  | 9            |
| <i>United States ex rel. Hall v. Lane</i> , App. D. C. 279-----                      | 10           |
| <i>United States ex rel. Henderson v. Lane</i> , Sup. Ct. D. C. 45 L. D.<br>649----- | 10           |
| <i>United States ex rel. Redfield v. Windom</i> , 137 U. S. 636-----                 | 9            |
| <i>Work v. Chestatee Co.</i> , 267 U. S. 185-----                                    | 2, 8, 10, 11 |
| <i>Work v. Rives</i> , 267 U. S. 175-----                                            | 1, 8, 10, 11 |
| Act of March 2, 1919, ch. 94, 40 Stat. 1272-----                                     | 9            |



# In the Court of Appeals of the District of Columbia

OCTOBER TERM, 1925

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No. 4367

No. 21, SPECIAL CALENDAR

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UNITED STATES OF AMERICA EX REL. CHARLES CARPY,  
W. A. T. Agard, F. H. Stewart et al., appel-  
lants

v.

HUBERT WORK, SECRETARY OF THE INTERIOR,  
appellee

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## BRIEF OF APPELLEE

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### THE FACTS

This is a companion case to one entitled *United States of America ex rel. A. H. Jarman, appellant, v. Hubert Work, Secretary of the Interior, appellee*, No. 4366, No. 20, Special Calendar, this court. Both were decided by the lower court on the opinions of the Chief Justice of the Supreme Court of the United States in the case of *Hubert Work, Secretary of the Interior, v. The United States ex rel. Logan Rives* (267 U. S. 75), and the case of

*Hubert Work, Secretary of the Interior, v. United States ex rel. Chestatee, etc.* (267 U. S. 185).

The proceedings in this case may be conveniently divided into 12 chapters, viz:

1. August 19, 1920: Original hearing before War Minerals Relief Commission, which rendered a full statement of the facts and reached this conclusion (transcript, p. 26):

It will be seen from this statement that the claimant's contract with the California Chrome Company resulted in their receiving \$17,629.85 less than the full market price for chrome ore which existed during 1917 and 1918. Losses in producing chrome, which are shown in the auditor's statement, are \$12,855.58. Therefore, had the claimants received a market price for their mineral there would have been no loss. In our opinion the losses resulted from the low price received for the ore, and were not due to Government stimulation.

2. October 26, 1920: The Secretary of the Interior gave the record consideration and concluded (transcript, p. 27):

I have considered the record and the objections filed, but find that the loss here was not due to such stimulation.

3. November 19, 1920: On rehearing the Secretary of the Interior made the following finding (transcript, p. 28):

The salient facts are that the property was visited July 10, 1917, by Mr. J. S. Diller, of



the Geological Survey, and such was the earliest possible date of governmental stimulation. Upon May 10, 1917, the Tedoc Company entered into a contract to deliver four thousand tons of chrome ore to the California Chrome Company. The claimant was, therefore, committed to an enterprise of that scope prior to any stimulation, and no increase in its operation or expenditure was due to any action of the United States. The loss was occasioned because the price fixed for the ore in this contract was lower than the market. Such a loss can not be attributed to the Government.

4. November 8, 1923: Another hearing was held at appellants' solicitation, and the doors were thrown wide open for the full reconsideration of their claim. This time the opinion was written by the First Assistant Secretary (transcript, pp. 40, 41, 42, 43), who commented extensively and reached this conclusion (transcript, p. 43):

The contract with the California Chrome Company was a definite declaration made *prior to stimulation* as to what the claimant company intended to do, and served as a measure of the scope of the mining operations in which it purposed to engage. The 4,000 tons of chrome ore were sold *prior to stimulation* at a price which caused the losses. It would not appear, therefore, that such losses can be attributed to the action of the agents of the Government. [Emphasis supplied.]

5. March 29, 1924: Upon a further rehearing the matter was again opened, heard at length, and the First Assistant Secretary of the Interior delivered an extensive and detailed opinion which begins on page 59 of the record and closes at the top of page 67, concluding with this very consistent statement:

Claimant had, prior to stimulation, assumed an obligation with respect to the chrome ore existing in the Tedoc property, which, however burdensome, it had no alternative but to fulfill. It was not privileged to abandon the undertaking without the consent of the California Chrome Company. It is a principle of the law of contracts that if the thing agreed to be done is possible and lawful it must be done and that whatever is necessary to the accomplishment of that which is expressly contracted to be done is a part and parcel of the contract, though not specified. The difficulty or improbability of accomplishing the undertaking will not avail as a defense. It must be shown that the thing can not by any means be effected. Nothing short of this will excuse nonperformance. The price has been fixed and the quantity had been fixed and it was expressly stipulated that any purchaser of the property would take subject to the rights guaranteed to the California Chrome Company. There were certain conditions and stipulations about the products of the Tedoc mine which claimant had covenanted to fulfill and upon breach of this contract said company was unquestion-



ably answerable in damages. Obviously Mr. Diller did not and could not change or modify the contract or minimize or increase the company's obligations and its loss was not effected or influenced by reason of his visit. It seems to be a case where, following a discouraging start, all the factors were carefully weighed before deciding upon a further course of procedure, and still seeing a margin of profit reasonably assured, the risks of the venture were deliberately assumed.

In this view of the matter no legal or moral responsibility rests upon the Government to assume or pay any portion of the loss sustained. The Department therefore adheres to its previous decision and the motion is denied.

6. June 4, 1924: The claim was given thorough consideration by a member of the War Minerals Relief Commission, Mr. John Briar, whose opinion is shown in the record at pages 67, 68, 69, and 70. He concludes:

I find no reason to disturb the decision promulgated in the claim.

7. June 14, 1924: The petition for rehearing was formally denied by the First Assistant Secretary in the following comprehensive statement and finding (transcript, p. 70):

All the questions presented and so forcibly urged were fully considered by the Department. Every important consideration bearing upon the matter has been thoroughly

weighed, and no reason is found to entertain an opinion different from that heretofore expressed.

8. June 17, 1924: For pure, unadulterated persistency appellant is becoming attractive. He wants another judgment. A new Secretary has appeared upon the scene and is petitioned for a rehearing.

9. July 25, 1924: He gets it—another judgment. Hon. Hubert Work refuses to reopen the case for good and sufficient reasons stated (transcript, p. 72):

This claim has received exhaustive consideration by the Department on numerous occasions. It was recommended for disallowance by the first Commission and was rejected by the Department October 26, 1920, based upon a finding that the company had, prior to the date of stimulation, entered into a certain contract for the sale of its product, which contract served as a definite measure of its intended mining operations, and that its losses were occasioned by its inability to receive the current market price for its ores. In other words, claimant did not incur a loss due to the request of Dr. Diller, inasmuch as all expenditures made after the date of such request were necessary to the carrying out of the contract with the California Chrome Company.

Thereafter the claim was reconsidered under the amendatory act of November 23, 1921 (42 Stat. 322), and November 8, 1923,



it was again rejected. On motion for rehearing the history of the operation was reviewed in detail and the previous decision was adhered to March 29, 1924. Petition for further consideration was denied June 14, 1924.

Counsel thereafter requested, and on July 7, 1924, was granted an oral hearing, but no sufficient reason is seen for disturbing the action heretofore taken, and the case will not be reopened.

10. July 6, 1925: Another trial and another denial. The Secretary here (transcript p. 76) reiterates the very cogent reasons upon which the denial is based, as follows:

It appears from the record that Mr. Diller, an authorized Government agent, did urge production, upon the basis of Government needs, and did hold out the inducement of increasing demand and increasing prices for ore, but the record also shows that Mr. Diller had no knowledge of the existence of the contract, that highly important factor being concealed from him by claimant. Claimant, therefore, does not stand in the position of claimants generally to whom Government appeal was made.

11. February 9, 1925: The Department has become as adamant. Appellant is discouraged and resorts to the court, praying a peremptory writ of mandamus to compel the Secretary to consider adjust, *allow* and *pay* his claims. The whole story is attached to the bill—the alphabet is exhausted

and partially doubled to identify the exhibits. With all these before it, the court in a few words (transcript 87-88) concisely applied the ruling of the *Rives* and *Chestatee* cases, *supra*, found nothing to distinguish the case at bar and denied the remedy sought to be invoked.

12. August 25, 1925: The appeal to this court was perfected, and a review for error of the action of the lower court sustaining appellant's demurrers to the replications is sought.

#### ARGUMENT

Appellee insists that the action of the lower court was eminently proper and should be affirmed. He contends, in the first place, that in the full exercise of his lawful jurisdiction he has given this claim a fair and thorough hearing. Further, that he has from its incipency concluded and specifically found that the loss claimed was the result of a contract consummated and existing prior to stimulation, was not due to stimulation, and, therefore, was a loss not contemplated by the Dent Act (40 Stat. 1272). He has considered it in all its details and ramifications, and, in the complete exercise of the discretionary power vested in him by the act, each time has consistently disallowed the claim. This finding under the Dent Act is "conclusive and final."

The general principle which controls the issuing of a writ of mandamus and injunction is familiar. It could be issued to direct the performance of a



ministerial act, but not to control discretion. It may be directed against a tribunal or one who acts in a judicial or quasi judicial capacity to require it or him to proceed, the manner of doing so being left to its or his discretion.

*I. C. C. v. Humboldt* (224 U. S. 474).

*United States ex rel. Boynton v. Blaine* (139 U. S. 306).

*United States ex rel. Redfield v. Windom* (137 U. S. 636-644).

*Carrick v. Lamar* (116 U. S. 423).

*Ex Parte Newman* (14 Wall. 152).

*Litchfield v. Register and Receiver* (9 Wall. 595).

*Secretary v. McGarrahan* (9 Wall. 298).

It is not apparent whether appellant contends that the finding of the Secretary was arbitrary and capricious. There is a subtle suggestion to that effect which causes appellee to observe that even if the court should undertake to apply the ruling so invoked—that when caprice participates in the judgment of disallowance or arbitrary action is involved therein, amounting to an abuse of discretion, the court may correct by mandamus—it is submitted that nothing of the kind characterizes this judgment of disallowance.

In the absence of proceedings to claimant's palpable disadvantage; i. e., a hearing in his absence, adjudication *sans* consideration, or upon an incomplete knowledge of the facts, a decision upon whim, caprice, or in total disregard of substantial

evidence to the contrary, such a question can not be raised. The simple averment that certain items of its claim were arbitrarily refused merely states a conclusion of law. Facts indicative thereof must be alleged. *Collins v. Johnston* (237 U. S. 502-512).

The fact that appellee gave the most critical examination to all evidence submitted, detailed and referred to it in his various opinions, and permitted the numerous rehearings shown by the record precludes any other reasonable hypothesis than that of full jurisdiction, as well as complete consideration.

The record fails to show that the decision of the Secretary was either arbitrary or capricious. There were three hearings in the Department, in which the relator was represented by able and enthusiastic counsel, and full consideration was given the somewhat difficult and complicated question involved. The conclusion reached, whether erroneous or not, is not a subject of review in this proceeding. *United States ex rel. Henderson v. Lane* (Sup. Ct. D. C. 45 L. D. 649). See also *United States ex rel. Hall v. Lane* (48 App. D. C. 279); *Heath v. Wallace* (138 U. S. 573-585); *Work v. Rives, supra*; *Work v. Chestatee, supra*.

As the lower court aptly stated, "The exhibits to the petitions show" that the claims were considered fully as to each and every item, and good and sufficient reasons were given by the Secretary for his action therein. (Transcript, 87-88.)



The court will not consider the merits involved until it is first determined that the Secretary of the Interior failed to *exercise discretion* in the premises. Neither will it go into the merits merely because it may find that an erroneous conclusion was reached by that official. To do so will completely revolutionize the jurisdiction of courts in mandamus proceedings, converting an extraordinary remedy into one of ordinary appeal and review.

This appeal raises the identical issue decided in the *Rives* and *Chestatee* cases, *supra*.

#### CONCLUSION

Appellee therefore contends that the lower court was right in its conclusion and should be affirmed.

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